NO.

IN THE

# Supreme Court of the United States

Hwang Geum Joo, Yuan Zhulin, Lola Tomasa Salinog, Liu Huang A-tau, Kim Boon-sun, Kim Sang Hee, Kim Soon-Duk, Yi Yong Nyo, Kim Bok-Dong, Lu Xiuzhen, Guo Yaying, Zhu Qiaomei, Prescila Bartonico, Narcisa Claveria, Maxima Regala de la Cruz, on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

Government of Japan,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## PETITION FOR A WRIT OF CERTIORARI

Michael D. Hausfeld (*Counsel of Record)*
Richard A. Koffman
Agnieszka M. Fryszman
Marka A. Peterson
COHEN MILSTEIN HAUSFELD & TOLL, P.L.L.C.
1100 New ~~York Avenue, N.W.~~, Suite 500
Washington, D.C. 20005
Telephone: (202) 408-4600

Counsel for Petitioners (additional counsel on inside cover)

Additional Counsel for Petitioners:

Barry A. Fisher
David Grosz
FLEISHMAN & FISHER
1888 Century Park East
Suite 1750
Los Angeles, CA 90067

Bill Lann Lee
Morris A. Ratner
Scott Nealey
LIEFF CABRASER HEIMANN & BERNSTEIN
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Duncan B. Hollis
Assistant Professor of Law
Temple University School of Law
1719 N. Broad Street
Philadelphia, PA 19122

## QUESTIONS PRESENTED

**1. Are claims for conduct related to a war constitutionally committed to the Executive Branch as a categorical matter under the political question doctrine?**

**2. What degree of deference do courts owe Executive Branch Statements of Interest in determining whether claims involving foreign affairs present a political question?**

**3. Does the interpretation of a foreign treaty present a nonjusticiable political question?**

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Hwang Geum Joo, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the D.C. Circuit is reported at 413 F.3d 45, and is reproduced in the Appendix beginning at 1a. Prior opinions of this Court, the Court of Appeals, and the District Court are reproduced in the Appendix, beginning at 17a, 18a, and 38a, respectively.

## JURISDICTION

Petitioners seek review of the judgment of the U.S. Court of Appeals for the D.C. Circuit dated June 28, 2005 (App. 1a). On September 14, 2005, Justice Ginsburg, as Circuit Justice, extended the time to file this petition to and including October 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT TREATY PROVISIONS

The relevant treaty provisions are reproduced in the Appendix at 70a.

## STATEMENT

This case concerns whether Japan is liable for trafficking in women and girls. Petitioners are fifteen women from China, Korea, the Philippines, and Taiwan who were taken by force, coercion or deception by the Japanese government between 1931 and 1945 and forced to serve as sex slaves – euphemistically known as "Comfort Women" – in state-established brothels, or "comfort stations." They were repeatedly beaten and raped, with some of the Petitioners forced to have sex as many as 40 times per day. Compl. ¶¶ 1, 7-21.

Japan operated the comfort stations as businesses where patrons were required to pay for the use of the women. Compl. ¶¶ 8, 55. The prices charged varied according to the ethnicity of the women. Compl. ¶¶ 8, 55. Proceeds from the comfort stations went to the Japanese government. Compl. ¶ 55. One of the Petitioners was only ten years old at the time of her abduction and enslavement. Compl. ¶ 20. The others ranged in age from thirteen to twenty-six. Compl. ¶¶ 7-19, 21. To this day, these women still bear severe physical and psychological scars from their brutalization at the hands of the Japanese government. Compl. ¶¶ 7-21, 64.

Historians estimate that Japan enslaved as many as 200,000 Comfort Women between 1931 and 1945, and that only about 30% of them survived their ordeal. David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 Colum. J. Transnat'l L. 533, 541-42 (1995). Most Comfort Women came from China, Korea, and other Asian countries. Japan began establishing comfort stations at least as early as 1931 during its colonization of Korea,[1] and continued to do so during World War II throughout the areas of Asia and the Pacific it controlled, including on American territory in Guam and the Philippines. Compl. ¶ 57; Yoshimi Yoshiaki, *Comfort Women* (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995).

In 1951, the United States and other Allied nations entered into a Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (App. 70a-108a) ("San Francisco Treaty"), that officially terminated the state of war between Japan and the Allied Powers. The San Francisco Treaty was

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[1] Petitioners allege in the Complaint that Japan's operation of the brothels and torts against Petitioners began in 1931, Compl. ¶¶ 1, 11-13, 16-18. Thus the Court of Appeals plainly erred in stating that Petitioners failed to argue that their claims concern conduct that predates World War II. 413 F.3d at 49 n.* (App. 9a).

signed during the Korean War, and only two years after the People's Republic of China (PRC) established control over the Chinese mainland. Thus, the Allied Powers did not include any entity representing China or any entity representing Korea.

The parties to the San Francisco Treaty agreed in Article 14(b) that the "Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of prosecution of the war . . . ." (App. 85a). The Executive Branch has acknowledged that "China and Korea did not become party to the 1951 Treaty," and that, therefore, "Article 14(b) of the Treaty, providing for waiver of all Allied claims against Japan, does not cover the PRC, Taiwan, or North or South Korea." (Statement of Interest of the United States of America at 25-26 (footnote omitted)).

Article 26 of the San Francisco Treaty obligates Japan to conclude "with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan . . . a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty." (App. 95a). This obligation, however, "expire[d] three years after the first coming into force of" the San Francisco Treaty. (App. 95a).

In the following decades, Japan entered into agreements with China, Korea and Taiwan. None of these agreements contained waivers of their nationals' claims congruent with those in Article 14(b) of the San Francisco Treaty.

In 1952, Japan and the Republic of China (ROC or Taiwan) concluded a Treaty of Peace, Japan-ROC, April 28, 1952, 1858 U.N.T.S. 38 (App. 109a-117a). Article XI of the Japan-ROC Treaty contains a provision related to claims

between the two countries, ("[u]nless otherwise provided for in the present Treaty ... any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty,") but no provision was made with respect to Taiwanese nationals. In 1965, Japan entered into a treaty with the Republic of Korea (South Korea), the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, 583 U.N.T.S. 258 (App. 118a-132a). Petitioners submitted an uncontested expert report demonstrating that the Korean treaty did not waive Comfort Women's claims. *See* Expert Report of Petitioners, Ex. 2 to Opposition to Defendant's Motion to Dismiss. The Democratic People's Republic of Korea (North Korea) and Japan have never concluded a treaty of peace.

In 1972, Japan and the PRC issued a Joint Communiqué (App.133a-136a). The plain language of the Communiqué does not waive the claims of the Comfort Women. Section 5 of the Communiqué states that "[t]he Government of the People's Republic of China . . . renounces its demand for war reparation from Japan," (App. 135a). However, the treaty does not purport to renounce claims of PRC nationals.

Japan steadfastly denied involvement in the enslavement and forced prostitution of the Comfort Women until 1992, when Japan's Chief Cabinet Secretary admitted for the first time the government's role in operating the comfort stations. Compl. ¶ 70. Even then, Japan continued to deny any role in "recruiting" the Comfort Women, claiming the comfort stations were the work of "private entrepreneurs." Compl. ¶¶ 68-70. Other than the Chief Cabinet Secretary's belated expression of "deep remorse," Japan has acknowledged no liability, made no reparations, and undertaken no prosecutions relating to the abduction, enslavement, and

forced prostitution of the Comfort Women. Compl. ¶¶ 70-71.

After the Japanese government's operation of the comfort stations was revealed, Petitioners sued Japan, on behalf of themselves and other Comfort Women, in the United States District Court for the District of Columbia.

The District Court dismissed Petitioners' claims on grounds that: 1) Japan was immune from suit because its trafficking in women for sexual exploitation and operation of brothels did not satisfy the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605 (a)(2); and 2) in the alternative, the Complaint presented a non-justiciable political question. *Hwang Geum Joo v. Japan,* 172 F. Supp. 2d 52, 63-64 (D.D.C. 2001) (App. 57a). The District Court also held that because the conduct was not commercial, it need not reach the issue of whether the FSIA applied retroactively. The United States Court of Appeals for the District of Columbia Circuit affirmed, albeit on different grounds, holding that the FSIA's commercial activity exception did not apply to claims based on pre-1952 conduct, and that sovereign immunity therefore barred Petitioners' claims. *Hwang Geum Joo v. Japan,* 332 F.3d 679, 685-86 (D.C. Cir. 2003) (App. 28a).

Shortly after the D.C. Circuit issued its decision, this Court held in *Republic of Austria v. Altmann* that the FSIA applied "to all pending cases regardless of when the underlying conduct occurred" and that the application of the statute served the Act's principal purpose of "eliminating political participation in the resolution of such claims." 541 U.S. 677, 679 (2004). Petitioners filed a petition for a writ of certiorari, which was granted. *Hwang Geum Joo v. Japan,* 124 S. Ct. 2835 (2004). This Court vacated the D.C. Circuit judgment and remanded the case to the Circuit Court for further consideration in light of *Altmann. Id.*

On remand, the D.C. Circuit once again affirmed the dismissal of Petitioners' claims, this time holding that the claims presented a non-justiciable political question. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52-53 (D.C. Cir. 2005) (App. 13a).

## REASONS FOR GRANTING THE WRIT

The D.C. Circuit's opinion dramatically expands the scope of the political question doctrine in a way that creates clear conflicts with other Courts of Appeals on all three questions presented. As a result of the D.C. Circuit's decision, the Circuit Courts now disagree on how to apply the political question doctrine to cases involving foreign affairs, including: 1) whether certain categories of claims – such as claims related to foreign conflicts – may be regarded as categorically committed to the Executive Branch under the political question doctrine; 2) the degree of deference owed to the Executive's view in cases related to foreign affairs; and 3) whether claims brought pursuant to statutory schemes for adjudicating foreign or international conduct are presumptively committed by Congress to resolution by the Judicial Branch. The importance of resolving the conflict among the circuits is heightened because of the political question doctrine's larger implications for separation of powers issues. *See generally Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

This conflict in the lower courts over the questions presented affects all cases involving claims against foreign states or implicating U.S. foreign relations. The current lack of uniformity on these questions is harmful to federal courts and foreign relations. In light of the horrific injustices involved in cases from the World War II era, the conflict in the lower courts has also made obtaining justice more painful

and uncertain for the remaining survivors. For these reasons, Petitioners urge the Court to grant certiorari.

## I. The Courts of Appeals Are Divided Over the Questions Presented.

### A. The D.C. Circuit's expansion of the political question doctrine, holding claims for conduct during wartime are categorically committed to the Executive Branch, conflicts with decisions of the Eleventh and Ninth Circuits.

In *Baker v. Carr*, the Court held that "the mere fact that [a] suit seeks protection of a political right does not mean it presents a political question." 369 U.S. at 209. The Court continued that although "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions[,] . . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Thus, the Court explained, a "discriminating analysis of the particular question posed" is required to determine if a case presents a political question. *Id.* The Court identified the following six factors as indicating the presence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the

> potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217. *See also Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004) (factors are listed in order of certainty and importance).

The Court also cautioned in *Baker* that courts must take a particularized approach rather then presuming certain types of cases are inherently nonjusticiable:

> The doctrine of which we treat is one of 'political questions,' not one of political cases.' ... The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."

*Id.* at 216.

The Courts of Appeals for the Eleventh, Ninth, and District of Columbia Circuits have reached conflicting conclusions regarding whether claims related to conduct during a war may be regarded, under the first *Baker* factor of the political question doctrine, as constitutionally committed to the Executive Branch as a categorical matter, or whether the application of the political question doctrine to claims involving foreign affairs depends on more specific considerations such as the nature of the claim and whether adjudication by the courts will use traditional tools of the judiciary.

The D.C. Circuit held that Petitioners' claims that Japan engaged in sex trafficking are categorically committed to the Executive Branch under the political question doctrine. 413

F.3d at 51-52 (App. 11a-15a). Its holding rested on the sweeping conclusion that because governments have authority to settle wars and war reparations claims, the federal government has authority for settling any additional claims related to conduct during World War II. *Id.* at 51 (App. 11a-12a). It further reasoned that although the San Francisco Treaty did not apply to Petitioners from Korea or China, that treaty, which waived U.S. nationals' claims, nevertheless evinced a U.S. policy of extinguishing war-related claims that confirmed the commitment of Petitioners' claims to the Executive Branch. *Id.* at 51-52 (App. 13a).

The D.C. Circuit's decision that claims related to conduct during a war are, by their general nature, committed to the Executive Branch under the political question doctrine squarely conflicts with the Eleventh Circuit decision in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). The appellate court ruled in that case that claims against German banks for participation in the Nazi "Aryanization" program were not barred under the political question doctrine. *Id.* at 1235. In contrast to the D.C. Circuit, the Eleventh Circuit held that the existence of World War II treaties and an executive agreement (the "Foundation Agreement," which provided a forum for redressing wartime property claims against Germany and German companies) did not render the claims non-justiciable. *Id.* at 1235. Moreover, just as the Petitioners alleged with respect to Japan's peace treaties, the Eleventh Circuit noted that the Foundation Agreement did not expressly settle or extinguish the claims, although it could have done so. *Id.*[2]

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[2] The Court went on to hold that the claims should not be adjudicated on international comity grounds because under that test, *inter alia*, an adequate alternative forum – the process established by the Foundation Agreement – existed for redressing the claims. *Ungaro-Benages*, 379 F.3d at 1239-40. *See also Dames & Moore v. Reagan*, 453 U.S. 654, 658 (1981) (finding Executive authority to suspend claims in U.S. courts

The D.C. Circuit's decision also conflicts with the Ninth Circuit's decision in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), *petition for cert. filed sub nom, Order of Friars Minor v. Alperin*, 74 U.S.L.W. 3146 (U.S. Sept. 7, 2005) (No. 05-326). In *Alperin*, the Ninth Circuit held that claims against the Vatican Bank, for property it allegedly acquired through an alliance with the repressive Ustasha government during World War II, were not barred by the political question doctrine. *Id.* at 548. In conflict with the D.C. Circuit's rationale (and paralleling the reasoning employed by the Eleventh Circuit in *Ungaro-Benages)*, the Ninth Circuit found that the claims were not barred by treaty, and, unlike World War II era claims against Germany, were not the subject of an executive agreement that provided an alternative means of redressing the claims. *Id.* at 549-52. The Ninth Circuit similarly rejected the idea that a general political desire to resolve claims relating to war-time conduct through agreements, by itself, warranted classifying specific claims as non-justiciable. *Id.* at 558 (rejecting defendant's argument that adjudication "would be inconsistent with the political branches' stated intent to resolve claims arising out of World War II by way of inter-governmental negotiations and diplomacy" and thus engender "embarrassment from multifarious pronouncements").[3] *See also Deutsch v. Turner*

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"buttressed" by the availability of an alternative forum for resolution of suspended claims). Petitioners did not have any comparable alternative tribunal on which the D.C. Circuit could rely.

[3] The Ninth Circuit also held that plaintiffs' other claims against the bank for aiding Ustasha Nazi atrocities, profiting from forced labor perpetrated by Ustasha government, and helping Ustasha officials escape after the war, were nonjusticiable because the complaint did not clearly allege whether or how the bank was directly involved, if at all, and the claims involved judging the Vatican's and the Ustasha regime's core wartime acts, judgments in which the United States had already engaged through undertakings such as the Nuremberg trials. *Id.* at 559-62. Moreover, the Ninth Circuit explicitly recognized that the case before it was distinct from "cases in which the defendants were the enslaving entities," which would be the case here. *See id.* at 560-61.

*Corp.*, 324 F.3d 692, 713 n.11, (criticizing a ruling below that "to order relief [for World War II-related claims] would therefore require the Court to interfere with the foreign affairs choices of the political branches" because "it makes every dispute over the proper application of a treaty into a political question" (criticizing *Deutsch v. Turner*, No. CV 00-4405 SVW (AJWX), 2000 WL 33957691, at *2-6 (C.D. Cal. Aug. 25, 2000)), *cert. denied sub nom., Suk Yoon Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003).

The First and Second Circuits have also held that cases involving claims for conduct related to highly politicized foreign wars do not raise a political question. In *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005), the First Circuit declined to overturn on political question grounds a District Court's interpretation of, among other things, Israel-PLO agreements, and held the political question doctrine did not apply to the case. Similarly, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), involved an Alien Tort Statute (ATS) complaint concerning rapes, forced prostitution, torture and murder carried out during the Bosnian-Serb war, allegedly by forces controlled by the defendant. The Second Circuit firmly rejected the defendant's argument that the claims were barred by the political question doctrine, reasoning that the tort suits there were "constitutionally committed" to the Judiciary. *Id.* at 249.

**B. The Circuit Courts are divided over the degree of deference owed by the Judicial Branch to Executive Branch Statements of Interest in deciding whether claims related to foreign affairs are justiciable.**

The Second, Eleventh and D.C. Circuits have taken conflicting approaches to the weight to accord an Executive

Statement of Interest in determining whether a case is justiciable.

In this case, the D.C. Circuit accorded complete deference to the Statement of Interest filed by the Executive Branch in holding that Petitioners' claims were non-justiciable. 413 F.3d at 48 (App. 6a) ("[O]ur Constitution does not vest the authority to resolve [this] dispute in the courts. Rather, we defer to the judgment of the Executive Branch of the United States Government['s] . . . thorough and persuasive Statement of Interest . . ."); *id.* at 52 ("The Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interest of the United States is compelling and renders this case nonjusticiable under the political question doctrine.").

The D.C. Circuit also relied on the Executive Statement of Interest for the other bases for its conclusion that the case presented a political question. For example, the Court cited only the Executive Statement of Interest in holding that it could not interpret the meaning of the respective Japanese treaties with China and Korea. *Id.* at 52 (App. 13a). In this respect the court stated:

> "Is it the province of a court of the United States to decide whether Korea's or Japan's reading of the treaty between them is correct, when the Executive has determined that choosing between the interests of two foreign states in order to adjudicate a private claim against one of them would adversely effect the foreign relations of the United States? Decidedly not."

*Id.* Similarly, it relied only on the Executive Statement of Interest in concluding that Congress could not have intended for aliens to bring claims related to conflicts for which the

same claims by U.S. citizens were barred by U.S. treaty. *Id.* at 50.[4]

In contrast, the Eleventh Circuit expressly declined to defer to the Executive's Statement of Interest in *Ungaro-Benages* in the political question context. There, the Court reversed the District Court's ruling that claims by Jewish heirs against banks that participated in the Nazi "Aryanization" program were non-justiciable. The Court declined to give dispositive effect to the Executive Branch's Statement of Interest, which had urged respect for the Foundation process and supported dismissal of the war-related claims on any valid legal ground. *Ungaro-Benages*, 379 F.3d at 1236.[5] The Court carefully examined whether and to what extent the Foundation Agreement addressed litigants' claims, in spite of the Executive Branch's Statement recommending dismissal, and concluded the Agreement did not bar plaintiffs' claims as a political question. *Id.* at 1235. The Court went on to note that "the Judiciary is not interfering with foreign relations or showing a lack of respect to the executive when it interprets an

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[4] The D.C. Circuit's complete deference to the Executive Branch also conflicts with Supreme Court precedent which establishes that determining *whether* a particular question is committed to the political branches falls squarely within the role of the courts. *Powell v. McCormack*, 395 U.S. 486, 519 (1969) ("For, as we pointed out in *Baker v. Carr*, supra, '(d)eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.'") (citing *Baker*, 369 U.S. at 211). *See also Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) ("the [political question] doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power") (emphasis in original) (Brennan, J., dissenting) (citing *Powell v. McCormack*, 395 U.S. 486, 519-21 (1969)).

[5] In its international comity analysis the Eleventh Circuit gave some deference to the Statement of Interest. 379 F.3d at 1236, 1239.

international agreement and follows its terms." *Id.* at 1236 n.12.

The D.C. Circuit's complete deference to the Executive Statement of Interest also conflicts with the Second Circuit's approach. In *Kadić*, the Executive's Statement of Interest disclaimed any foreign relations concerns with the case. 70 F.3d at 250. The Second Circuit reasoned, however, that even if the Executive had taken the view that the Court must apply the political question doctrine, that view, although "entitled to respectful consideration, would not necessarily preclude adjudication." *Id.* Thus, like the Eleventh Circuit, the Second Circuit's approach conflicts with the complete deference shown by the D.C. Circuit in this case.

**C. The D.C. Circuit's decision conflicts with decisions of this Court and Circuit Court decisions interpreting treaties to which the United States is not a party for purposes of determining claimants' entitlements under U.S. law.**

The D.C. Circuit held that it could not construe the meaning of Japan's treaties with Korea and China because choosing between the interests of the foreign states would adversely affect foreign relations. 413 F.3d at 51-52 (App. 13a). Moreover, the Circuit Court held construction of the treaties was foreclosed by United States foreign policy, which, according to the Statement of Interest, committed resolution of claims related to World War II to the political branches. *Id.* at 52 (App. 13a-15a).

The D.C. Circuit's holding that a political question is presented by the interpretation of foreign treaties conflicts with *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). Twenty years after he first adumbrated the political question doctrine in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), Chief Justice Marshall had no qualms about interpreting the

1763 Treaty between Spain, Great Britain and France in the seminal property case of *Johnson v. M'Intosh*, 21 U.S. at 584 ("By the 20th article of the [1763] treaty Spain ceded Florida with its dependencies and all the country she claimed east or southeast of the Mississippi to Great Britain").

Similarly, in *Foster*, the fact that Spain and France disagreed about the meaning of the 1800 French-Spanish Treaty of St. Ildefonso did not preclude Chief Justice Marshall from analyzing the treaty for purposes of determining what property the United States had purchased from France as part of the Louisiana Purchase, and what property Spain had transferred to the United States in their 1819 Treaty of Amity. 27 U.S. at 306-307 (finding Treaty of St. Ildefonso susceptible to either French or Spanish interpretation). *See also United States v. Percheman* 32 U.S. (7 Pet.) 51, 89, 94-95 (1833) (reasoning that Article 8 of the 1819 U.S. Treaty of Amity with Spain validated an alien's title to parcel of land in West Florida [a reading that comported with the Spanish interpretation of Treaty of St. Ildefonso], and holding that, notwithstanding the contrary view of the Attorney General, a statute designed to "provide for the final settlement of land claims in Florida" did not cover or preclude the alien's claim).

The D.C. Circuit's decision to deem interpretation of foreign treaties a political question also conflicts with more recent decisions of the First, Fourth and Eleventh Circuits.

In 2000, the Fourth Circuit interpreted the same treaty at issue in *Johnson v. M'Intosh* to determine whether Spain had waived its claim to a shipwrecked warship. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 643 (4th Cir. 2000) ("The District Court found that Spain had expressly abandoned LA GALGA in Article XX of the Treaty of 1763 . . . . This interpretation, however, contravenes the plain language of the 1763 Treaty."). *See*

*also Robertson v. General Electric Co.*, 32 F.2d 495 (4th Cir. 1929) (holding that § 308 of the Treaty of Versailles, to which the United States was not a party, had become obsolete and should not be construed as imposing additional obligations or rights on the United States or Germany beyond those in the Treaty of Berlin).

Even more recently, the Eleventh Circuit Court of Appeals interpreted an article of the Headquarters Agreement between Austria and the Organization of the Petroleum Exporting Countries (OPEC) to preclude service of process in accordance with Fed. R. Civ. P. 4(f)(2)(C)(ii) where that Agreement had been incorporated into Austrian law. *Prewitt Enters. Inc. v. OPEC*, 353 F.3d 916, 923-24 (11th Cir. 2003).

Finally, in *Ungar*, the First Circuit Court of Appeals declined to find the District Court had "intruded into forbidden territory when it interpreted an array of . . . Israeli-PLO agreements," and ruled that such interpretations did not impede the constitutional prerogatives of the political branches over foreign policy that the political question doctrine protects. 402 F.3d at 280.

In each of these cases, the Court interpreted a treaty to which the United States was not a party because that interpretation had some effect on the claimants' cause of action under a separate U.S. law or treaty, exactly the sort of interpretation that the D.C. Circuit decided would be precluded by the political question doctrine in this case.

The D.C. Circuit's opinion also conflicts with the Court's holding in *Japan Whaling* that courts should not refrain from deciding cases that involve construing treaties or agreements, even where that construction might implicate *or even conflict with* foreign policy. 478 U.S. at 230. In *Japan Whaling*, the Petitioners contended that the case presented a political question because the courts might conclude the Secretary of

Commerce was required to certify Japan as non-compliant with an international whaling treaty, which would "conflict with and be a repudiation of" the United States' prior agreement with Japan that Japan could continue limited whaling in the short term. *Id.* at 228.

This Court rejected that argument in strong terms. *Id.* at 230. Although noting that the political question doctrine excludes courts from policy choices constitutionally committed to the political branches, the Court held that the case did not present a political question, even if adjudication implicated the executive branch's policy towards Japan:

> *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. . . . We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

*Id.* Thus, the D.C. Circuit's holding that it could not interpret the treaties at issue here because doing so might interfere with U.S. foreign policy towards Japan runs afoul of *Japan Whaling*.

## II. Certiorari Should Be Granted In Light of The Important Separation of Powers Questions Raised by This Case.

The questions presented by this case raise fundamental separation of powers issues involving whether and to what extent Executive power over foreign affairs may trump Congress and the Judiciary. *See Baker*, 369 U.S. at 210. The D.C. Circuit posited a sweeping view of the Executive's role in foreign affairs by holding that claims related to conduct during a war are the exclusive province of the Executive Branch, and by giving virtually blanket deference to the Executive Statement of Interest in determining whether a court has jurisdiction.[6] 413 F.3d 45 (App. 1a-16a). The Circuit Court's expansive view of Executive power over foreign affairs disregards the statutory schemes under which Petitioners brought their claims, the FSIA and the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), and disregards the role Congress mandated for the Judiciary in such cases.[7]

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[6] The D.C. Circuit also held it could address the political question doctrine prior to establishing subject matter jurisdiction. 413 F.3d at 47-48 (App. 4a). This was incorrect. *Powell v. McCormack*, 395 U.S. 486, 512 (1969) (there is a difference "between determining whether a federal court has 'jurisdiction of the subject matter' and whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"); *Baker*, 369 U.S. at 198-199 (same); *Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d Cir. 1980).

[7] Indeed, the D.C. Circuit deferred to the Executive Statement of Interest in holding that "'the President *and Congress*'" could not have intended Petitioners, who are aliens, to bring their claims in federal court, when the claims of U.S. nationals had been waived by the San Francisco Treaty. 413 F.3d at 50 (quoting Executive Statement of Interest) (emphasis added). Deferral to the Executive Branch's view of Congress' intention is particularly at odds with separation of powers principles, especially given that Congress has already spoken by enacting the ATS, which may in many cases have precisely the effect of which the Circuit Court complains, since it provides jurisdiction only for claims by aliens.

The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities'." *Altmann*, 541 U.S. at 691 (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983)). The Court has made clear that "two of the Act's principal purposes" are to "clarify[ ] the rules judges should apply in resolving sovereign immunity claims and *eliminate political participation in the resolution of such claims*," and that, "to accomplish these purposes, Congress established a comprehensive framework for resolving any claim of sovereign immunity . . . ." *Id.* at 699 (emphasis added).

Both the FSIA and the ATS represent exercises of Congress' exclusive power to regulate the jurisdiction of lower federal courts. U.S. Const. art. I, § 8, cl. 9; *id.*, art. III, § 1. Nothing in the Constitution vests the Executive Branch with any power over the subject matter jurisdiction of lower federal courts. Hence, Judicial recognition of Executive Branch authority to override the exercise of congressionally conferred jurisdiction conflicts with the textually-vested congressional authority to regulate the business of lower federal courts, particularly given that federal courts are "possessed of the virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). *See also Japan Whaling, Ass'n*, 478 U.S. at 230 (a court "cannot shirk [its] responsibility merely because [its] decision may have significant political overtones.").

The First Circuit recognized this in *Ungar* in holding that claims brought under the Anti-Terrorism Act, 18 U.S.C. §§ 2333-2338 (ATA) did not raise a political question, even if they were related to the Palestinian-Israeli conflict and certain PLO-Israeli agreements. 402 F.3d at 280. Instead, the court stated that applying the political question doctrine

would reflect a misunderstanding of the "fundamental nature of this action . . . a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a legal remedy for injuries or death occasioned by acts of international terrorism." *Id.* The *Ungar* Court went on to note that the purpose of both the ATA and the FSIA was to transfer determinative authority on questions of immunity from the Executive Branch to the Judicial Branch to ensure such decisions are made on purely legal grounds: "After all, Congress enacted the ATA, and the President signed it. The very purpose of the law is to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime." *Id.* at 280.

As the First, Second, Ninth, and Eleventh Circuits recognized in *Ungar*, 402 F.3d 274, *Kadić*, 70 F.3d 232, *Alperin*, 410 F.3d 532, and *Ungaro-Benages*, 379 F.3d 1227, deferring completely to the Executive – either by referring entire categories of cases to the Executive Branch, or according complete deference to each Executive Statement of Interest filed in cases that involve foreign affairs – would undermine that legislative framework. Instead, separation of powers principles counsel that there can be no Executive trump over the exercise of congressionally conferred jurisdiction.

Indeed, the Court has previously been wary of such Executive power. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Court rejected an argument that the act of state doctrine should be applicable only when the Executive Branch expressly stipulated that it did not wish the courts to pass on the validity of the act being challenged. *Id.* at 436. And in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), six Justices went further by holding that courts should not defer to Executive Branch views regarding the application of the act of state doctrine. Justice Douglas complained that the alternative would make

the courts "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'." *Id.* at 773 (Douglas, J., concurring). Justice Powell explained that he "would be uncomfortable with a doctrine which would require the Judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine." *Id.* (Powell, J., concurring). Justice Brennan, for the four dissenters who agreed with Justices Powell and Douglas that courts should not defer absolutely to Executive views on the act of state doctrine, noted that under the alternative "the fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment." *Id.* at 792 (Brennan, J., joined by Stewart, Marshall & Blackmun, JJ., dissenting).

The D.C. Circuit's holding that merely interpreting a treaty raised a political question, 413 F.3d at 52, similarly implicates the separation of powers. This Court has long held that "[t]he construction of treaties is the peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 32 (1899). *Accord, e.g., Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Wilson v. Wall*, 73 U.S. 83, 89 (1867). As Justice Black put it, "courts interpret treaties for themselves." *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

Thus while the Court has often remarked that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999), the Court's accordance of weight to the Executive's view of a treaty's meaning has never meant that the Court will defer to the Executive's wish that litigants' rights under treaties not be adjudicated at all. To the contrary, "[t]he

courts have been clear . . . that interpretation of a treaty for purposes of a case before them is a legal and not a political question." Restatement (Third) of Foreign Relations Law of the United States § 326 reporters' note 3 (1987) (hereinafter Restatement).

Although the interpretation of foreign law undoubtedly can raise foreign relations issues equally significant to those alleged in this case, federal courts treat "foreign law" as a particularly judicial "question of law." Fed. R. Civ. P. 44.1. Treaties of the kind presented here are no different in this regard. Indeed, the Restatement specifically provides, consistent with *Johnson v. M'Intosh*, 21 U.S. at 584, and *Foster*, 27 U.S. at 306-07, that "[t]he determination or interpretation of international law *or agreements* is a question of law and is appropriate for judicial notice in courts in the United States without pleading or proof." Restatement § 113(1) (emphasis added).

This Court's recent iteration in *Japan Whaling Association*, 478 U.S. at 229-30, of courts' obligation to interpret treaties even in politically controversial cases was earlier made equally clear in *Baker* itself:

> [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. . . . For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action * * * must be regarded as of controlling importance,' if there has been no conclusive 'governmental action' *then a court can construe a treaty* and may find it provides the answer.

369 U.S. at 211-12 (emphasis added) (ellipsis in the original).

Because the decision violates separation of powers principles – and wrongly denies Comfort Women a judicial forum provided by Congress – Petitioners' writ should be granted.

Dated: October 26, 2005

Respectfully Submitted:

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Michael D. Hausfeld
Richard A. Koffman
Agnieszka M. Fryszman
Marka Peterson
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
1100 New York Avenue, N.W.
West Tower - Suite 500
Washington, D.C. 20005-3964
(202) 408-4600

Barry A. Fisher
David Grosz
Fleishman & Fisher
1888 Century Park East, Suite 1750
Los Angeles, CA 90067
(310) 557-1077

Bill Lann Lee
Morris A. Ratner
Scott P. Nealey
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, Suite 3000
San Francisco, CA 94111
(415) 956-1000

Duncan B. Hollis
Assistant Professor of Law
Temple University School of Law
1719 N. Broad St.
Philadelphia, PA 19122
(215) 204-2731

# APPENDIX

## OPINIONS BELOW

United States Court of Appeals,
District of Columbia Circuit.

HWANG GEUM JOO, et al., Appellants
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

**No. 01-7169.**

Argued March 22, 2005.
Decided June 28, 2005.

Before: GINSBURG, Chief Judge, and SENTELLE and TATEL, Circuit Judges.

GINSBURG, Chief Judge.

We again review the district court's dismissal of the appellants' complaint alleging Japanese soldiers "routinely raped, tortured ... [and] mutilated" them, along with thousands of other women, in occupied countries before and during World War II. *Hwang Geum Joo v. Japan*, 332 F.3d 679, 681 (D.C.Cir.2003). The case returns to us now on remand from the Supreme Court. Having had the benefit of further briefing and argument, we affirm the judgment of the district court on the ground that the case presents a nonjusticiable political question, namely, whether the governments of the appellants' countries foreclosed the appellants' claims in the peace treaties they signed with Japan.

## I. Background

The facts of this case are set forth in our previous opinion, id. at 680- 81. In brief, the appellants are 15 women from China, Taiwan, South Korea, and the Philippines; in 2000 they sued Japan in the district court under the Alien Tort Statute, 28 U.S.C. § 1350, "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II," in violation of "both positive and customary international law." 332 F.3d at 680, 681.

*47 The district court dismissed the appellants' complaint, *Hwang Geum Joo v. Japan*, 172 F.Supp.2d 52, 63 (D.D.C.2001), concluding first that Japan's alleged activities did not "arise in connection with a commercial activity" and therefore did not fall within the commercial activity exception in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). Accordingly, the district court did not consider the second requirement for jurisdiction under that exception--that "Japan's alleged conduct caused a 'direct effect' in the United States." 172 F.Supp.2d at 64 n. 8. The district court went on to hold in the alternative that the complaint presents a nonjusticiable political question, noting that "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan." Id. at 67.

We affirmed on the ground that Japan would have been afforded absolute immunity from suit in the United States at the time of the alleged activities, 332 F.3d at 685, and that the Congress did not manifest a clear intent for the commercial

activity exception to apply retroactively to events prior to May 19, 1952, when the State Department first espoused the restrictive theory of immunity later codified in the FSIA, id. at 686. The Supreme Court, however, held in *Republic of Austria v. Altmann*, 541 U.S. 677, 699, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004), that the FSIA applies to all cases filed thereunder "regardless of when the underlying conduct occurred." Accordingly, the Court granted the appellants' petition for a writ of certiorari, vacated our judgment, and remanded the case to this court for further consideration in light of Altmann. *Hwang Geum Joo v. Japan*, --- U.S. ----, 124 S.Ct. 2835, 159 L.Ed.2d 265 (2004).

## II. Analysis

The appellants again urge this court to reverse the district court's holding that their claims are not "based upon ... act[s] ... in connection with a commercial activity," 28 U.S.C. § 1605(a)(2), and to remand the case to the district court for it to decide in the first instance whether Japan's alleged actions "cause[d] a direct effect in the United States." Id. Japan, and the United States as amicus curiae, again argue that Japan enjoys sovereign immunity because its alleged activities were not commercial and, in any event, that the appellants' complaint presents a nonjusticiable political question.

As explained below, we agree with the latter argument and therefore do not address the issue of sovereign immunity. The appellants, however, citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), contend that "[b]efore reaching [the]

political question [doctrine], this [c]ourt must establish jurisdiction" under the FSIA. We turn first to that issue.

A. The Order of Proceeding

[1][2] As the Supreme Court stated in *Steel Co.*, "For a court to pronounce upon the meaning ... of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." 523 U.S. at 101-02, 118 S.Ct. 1003. The court must therefore "address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits." *Tenet v. Doe*, --- U.S. ----, ---- n. 4, 125 S.Ct. 1230, 1235 n. 4, 161 L.Ed.2d 82 (2005).

[3] The appellants apparently assume, but point to no authority suggesting, a dismissal under the political question doctrine is an adjudication on the merits. That is not how the Supreme Court sees the matter:

[T]he concept of justiciability, which expresses the jurisdictional limitations imposed ***48** upon federal courts by the 'case or controversy' requirement of Art. III, embodies ... the ... political question doctrine [ ] .... [T]he presence of a political question [thus] suffices to prevent the power of the federal judiciary from being invoked by the complaining party.

*Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974).

Moreover, *Steel Co.* "does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (within court's discretion to address personal jurisdiction

before subject-matter jurisdiction); see also *Toca Producers v. FERC*, 411 F.3d 262, 264 (D.C.Cir.2005) (addressing ripeness before standing). Rather, as this court held In re Papandreou, "a court that dismisses on other non-merits grounds such as forum non conveniens and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying ... *Steel Company*." 139 F.3d 247, 255 (1998). As the Supreme Court stated in *Tenet*, "application of the *Totten* rule of dismissal, [92 U.S. 105, 23 L.Ed. 605 (1876),] like the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." 125 S.Ct. at 1235 n. 4. Likewise, we need not resolve the question of the district court's subject-matter jurisdiction under 28 U.S.C. § 1330--that is, whether Japan is entitled to sovereign immunity under the FSIA, see *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 121 (D.C.Cir.1999) (the FSIA "is the sole basis for obtaining jurisdiction over a foreign state in our courts")--before considering whether the complaint presents a nonjusticiable political question, *see Ruhrgas*, 526 U.S. at 585, 119 S.Ct. 1563 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits").

B. The Political Question Doctrine

[4] The War in the Pacific has been over for 60 years, and Japan has long since signed a peace treaty with each of the

countries from which the appellants come. The appellants maintain those treaties preserved, and Japan maintains they extinguished, war claims made by citizens of those countries against Japan. As explained below, our Constitution does not vest the authority to resolve that dispute in the courts. Rather, we defer to the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.

*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), remains the starting point for analysis under the political question doctrine. There the Supreme Court explained that "[p]rominent on the surface of any case held to involve a political question is found" at least one of six factors, the first of which is "a textually demonstrable constitutional commitment of the issue to a coordinate political department ...." *Id.* at 217, 82 S.Ct. 691. [FN*] Of *49 course, questions concerning foreign relations "frequently ... involve the exercise of a discretion demonstrably committed to the executive or legislature"; the Court cautioned, however, that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211, 82 S.Ct. 691. Courts are therefore to focus their analysis upon "the particular question posed, in terms of the history of its management by the political branches." *Id.*

FN* Other factors that indicate a political question, the Court in Baker explained, are: "a lack of

> judicially discoverable and manageable standards for resol[ution]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

The Supreme Court has recently given further direction more closely related to the legal and factual circumstances of this case: A policy of "case-specific deference to the political branches" may be appropriate in cases brought under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 2766 n. 21, 159 L.Ed.2d 718 (2004). In Sosa, the Court took note of certain class actions seeking damages for those injured by "the regime of apartheid that formerly controlled South Africa"; in each case the United States had filed a Statement of Interest counseling dismissal because prosecution of the case would interfere with South Africa's policy of "deliberately avoid[ing] a 'victors' justice' approach to the crimes of apartheid" in favor of "confession and absolution ... reconciliation, reconstruction, reparation and goodwill." *Id.* "In such cases," the Court explained, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* Similarly, the Court in *Altmann* noted that a Statement of Interest concerning "the

implications of exercising jurisdiction over [a] particular [foreign government] in connection with [its] alleged conduct ... might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702, 124 S.Ct. 2240; see also *id.* at 714, 124 S.Ct. 2240 (Breyer, J., concurring) (citing district court's opinion in this case).

With these principles in mind, we turn to "the particular question posed" in this case, *Baker*, 369 U.S. at 211, 82 S.Ct. 691, namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the appellants' claims. As we explained in our previous opinion, Article 14 of the 1951 Treaty of Peace between Japan and the Allied Powers, 3 U.S.T. 3169, "expressly waives ... 'all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.' " 332 F.3d at 685.

The appellants from China, Taiwan, and South Korea argue that because their governments were not parties to the 1951 Treaty, the waiver of claims provision in Article 14 did not extinguish their claims. Neither, they argue, did the subsequent agreements between Japan and the governments of their countries. Although the appellants acknowledge that "it may seem anomalous that aliens may sue where similar claims of U.S. nationals are waived," they argue "that is precisely the result contemplated by ... the [Alien Tort Statute], 28 U.S.C. § 1350." [FN*]

FN* Despite the district court's having dismissed their complaint on the ground that "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan" and that a United States "court is not the appropriate forum in which plaintiffs may seek to reopen those discussions," 172 F.Supp.2d at 67, the appellants argue for the first time in their post-remand Supplemental Reply Brief that because they allege injuries dating back to 1931, their claims did not arise solely from "the prosecution of the war," which in Article 8(a) of the 1951 Treaty is defined as having begun on September 1, 1939, the day Germany invaded Poland. This argument, raised for the first time in the appellants' fourth and final brief on appeal, comes far too late for the court to consider, *cf. Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C.Cir.2002) ("our caselaw makes clear that an argument first made in the reply comes too late").

***50** "Anomalous" is an understatement. See Statement of Interest of the United States at 28 ("it manifestly was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan ... while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals"). Even if we assume, however, as the appellants contend, that the 1951 Treaty does not of its own force deprive the courts of the United States of jurisdiction over their claims, it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort

suits. Indeed, Article 26 of the Treaty obligated Japan to enter "bilateral" peace treaties with non-Allied states "on the same or substantially the same terms as are provided for in the present treaty," which indicates the Allied Powers expected Japan to resolve other states' claims, like their own, through government-to-government agreement. To the extent the subsequent treaties between Japan and the governments of the appellants' countries resolved the claims of their respective nationals, the 1951 Treaty at a minimum obliges the courts of the United States not to disregard those bilateral resolutions.

First, the Republic of the Philippines, as an Allied Power, was a signatory to the 1951 Treaty itself and thus at least purported to waive the claims of its nationals. 136 U.N.T.S. at 137, ratified 260 U.N.T.S. 450. Then in 1952 Japan reached an agreement with the Republic of China (Taiwan), 138 U.N.T.S. 37, which did not expressly mention the settlement of individual claims but did state in Article XI that "[u]nless otherwise provided for in the present Treaty ... any problem arising between [the parties] as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the [1951] Treaty." In 1965 Japan and the Republic of Korea (South Korea) entered into an agreement providing that "the problem concerning property, rights, and interests of the two Contracting Parties and their nationals ... and concerning claims between the Contracting Parties and their nationals ... is settled completely and finally." 583 U.N.T.S. 258, 260 (Art. II, § 1). Finally, in 1972 Japan and the People's Republic of China issued a Joint Communiqué in which China "renounce[d] its demand for

war reparation from Japan," and in 1978 Japan and China affirmed in a formal treaty of peace that "the principles set out in [the Joint Communiqué] should be strictly observed." 1225 U.N.T.S. 269.

As evidenced by the 1951 Treaty itself, when negotiating peace treaties,

governments have dealt with ... private claims as their own, treating them as national assets, and as counters, 'chips', in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one *51 category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts.

Louis Henkin, Foreign Affairs and the Constitution 300 (2d edition 1996); see *Dames and Moore v. Regan*, 453 U.S. 654, 688, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (upholding President's authority to settle claims of citizens as "a necessary incident to the resolution of a major foreign policy dispute between our country and another [at least] where ... Congress acquiesced in the President's action"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (acknowledging "President's authority to provide for settling claims in winding up international hostilities").

The governments of the appellants' countries apparently had the authority--at least the appellants do not contest the point--to bargain away their private claims in negotiating a peace with Japan and, as we noted previously, it appears "in fact

[they] did." 332 F.3d at 685. Indeed, Professor Henkin reports that "except as an agreement might provide otherwise, international claim settlements generally wipe out the underlying private debt, terminating any recourse under domestic law as well." Above at 300. The Supreme Court first expressed the same understanding with respect to the Treaty of Paris ending the War of Independence, which expressly provided for the preservation of private claims. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230, 1 L.Ed. 568 (1796), a case brought by a British subject to recover a debt confiscated by the Commonwealth of Virginia during the war, Justice Chase wrote:

> I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violencies, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. (Emphasis supplied).

Contrary to that principle, the appellants insist the treaties between Japan and Taiwan, South Korea, and China

preserved the claims of individuals by failing to mention them (a claim that would be untenable with respect to the Philippines). Japan does not agree, nor does the Department of State, which takes the position that "[t]he plaintiffs' governments ... chose to resolve those claims through international agreements with Japan." Statement of Interest at 31. In order to adjudicate the plaintiffs' claims, the court would have to resolve their dispute with Japan over the meaning of the treaties between Japan and Taiwan, South Korea, and China, which, as the State Department notes in arguing this case is nonjusticiable, would require the court to determine "the effects of those agreements on the rights of their citizens with respect to events occurring outside the United States." *Id.*

The question whether the war-related claims of foreign nationals were extinguished when the governments of their countries entered into peace treaties with Japan is one that concerns the United ***52** States only with respect to her foreign relations, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches, with "the President [having] the 'lead role.' " *Garamendi*, 539 U.S. at 423 n. 12, 123 S.Ct. 2374. And with respect to that question, the history of management by the political branches, *Baker*, 369 U.S. at 211, 82 S.Ct. 691, is clear and consistent: Since the conclusion of World War II, it has been the foreign policy of the United States "to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting the resolution of those claims through political means." Statement of Interest at 29; see also S.Rep.

No. 82-2, 82d Cong., 2d Sess. 12 (1952) ("Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish"); *Aldrich v. Mitsui & Co. (USA)*, Case No. 87-912-Civ-J-12, Slip Op. at 3 (M.D.Fla. Jan. 20, 1988) (following State Department's recommendation to dismiss private claim as barred by 1951 Treaty); *In re World War II Era Japanese Forced Labor Litigation*, 114 F.Supp.2d 939, 946-48 (N.D.Cal.2000) (same).

[5] It is of course true, as the appellants point out, that in general "the courts have the authority to construe treaties and executive agreements," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986); see also *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-36 (11th Cir.2004). At the same time, the Executive's interpretation of a treaty is ordinarily entitled to "great weight," *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982).

Here, however, the United States is not a party to the treaties the meaning of which is in dispute, and the Executive does not urge us to adopt a particular interpretation of those treaties. Rather, the Executive has persuasively demonstrated that adjudication by a domestic court not only "would undo" a settled foreign policy of state-to-state negotiation with

Japan, but also could disrupt Japan's "delicate" relations with China and Korea, thereby creating "serious implications for stability in the region." Statement of Interest at 34-35. Consider: According to the appellants the Republic of Korea does not agree with Japan's understanding that the treaty between them extinguished the appellants' claims against Japan. See Reply Brief of Appellants at 15 n. 14 (quoting Korean Foreign Minister as saying that "it is the government's position that the [Treaty of 1965] does not have any effect on individual rights to bring claims or lawsuits," Decl. of Prof. Chang Rok Kim, Pls.' Opp. Mot. Dismiss. Ex. 2 at 12). Is it the province of a court in the United States to decide whether Korea's or Japan's reading of the treaty between them is correct, when the Executive has determined that choosing between the interests of two foreign states in order to adjudicate a private claim against one of them would adversely affect the foreign relations of the United States? Decidedly not. The Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine.

## III. Conclusion

We hold the appellants' complaint presents a nonjusticiable political question, ***53** namely, whether the governments of the appellants' countries resolved their claims in negotiating peace treaties with Japan. In so doing we defer to "the considered judgment of the Executive on [this] particular question of foreign policy." *Altmann*, 541 U.S. at 702, 124 S.Ct. 2240; *Cf. Alperin v. Vatican Bank*, 410 F.3d 532 (9th

Cir.2005) ("Condemning--for its wartime actions--a foreign government with which the United States was at war would require us to review an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed"). For the court to disregard that judgment, to which the Executive has consistently adhered, and which it persuasively articulated in this case, would be imprudent to a degree beyond our power.

Accordingly, as we said when this case was previously before us, "much as we may feel for the plight of the appellants, the courts of the United States simply are not authorized to hear their case." 332 F.3d at 687. For the foregoing reasons, the judgment of the district court is

*Affirmed.*

Supreme Court of the United States

HWANG GEUM JOO, et al, petitioners,
v.
JAPAN.
No. 03-741.

June 14, 2004.

Case below, 332 F.3d 679.

JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159L.Ed.2d 1 (2004).

United States Court of Appeals,
District of Columbia Circuit.

HWANG GEUM JOO, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

**No. 01-7169.**

Argued Dec. 10, 2002.
Decided June 27, 2003.
Rehearing and Rehearing En Banc Denied Aug. 22, 2003.

Before: GINSBURG, Chief Judge, and SENTELLE and TATEL, Circuit Judges.

Opinion for the Court filed by GINSBURG, Chief Judge.

GINSBURG, Chief Judge:

The appellants are 15 women from China, Taiwan, South Korea, and the Phillippines; they brought this suit against Japan, seeking money damages for having been subjected to sexual slavery and torture before and during World War II. The district court held Japan immune from suit pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, because it had not waived its immunity and the conduct alleged did not come within the commercial activity exception to the FSIA. The district court also held the suit was barred under the political question doctrine.

We affirm the judgment of the district court. Under the FSIA Japan is entitled to immunity from suit concerning the pre-1952 acts alleged in this case. We reject the appellants' argument that violation of a *jus cogens* norm constitutes a waiver of sovereign immunity.

## I. Background

The appellants allege that between 1931 and 1945 the Government of Japan abducted, coerced, or deceived them and a large number of other girls and women from occupied territories to serve as "comfort ***681** women," a euphemism for sex slaves, at so-called "comfort stations" near the front lines of the war, where the women were routinely raped, tortured, beaten, mutilated, and in some cases murdered. The appellants assert that these comfort stations were operated by the Japanese Army, which charged soldiers a fee for access to the women.

Only in 1992 did the Government of Japan acknowledge having had any involvement with the comfort stations, which it had previously attributed to entrepreneurs who employed "voluntary prostitutes." In 2000 the appellants filed a complaint in the district court invoking the Alien Tort Statute, 28 U.S.C. § 1350, and alleging that Japan had violated both positive and customary international law. Japan filed a motion to dismiss the complaint on the ground of sovereign immunity, which motion the district court granted.

The district court determined that its jurisdiction over Japan, if any, must rest solely upon the FSIA. *Hwang Geum Joo v. Japan*, 172 F.Supp.2d 52, 56 (D.D.C.2001). Because that statute was not enacted until 1976, the court first considered whether the FSIA applies retroactively to the actions alleged in this case. *Id.* at 57-58. The district court did not reach a conclusion on that issue, however, instead holding that, even if the FSIA does govern the plaintiffs' claims, none of the exceptions to sovereign immunity provided in the FSIA applies. *Id.* at 58. The district court rejected the appellants' arguments that Japan had waived its immunity to suit in the United States, either explicitly by agreeing to the Potsdam Declaration - an argument abandoned on appeal - or implicitly by its commission of *jus cogens* violations, and that Japan's activities came within the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2). *Id.* at 64. The district court held in the alternative that the case must be dismissed because it presents a nonjusticiable political question. *Id.* at 67.

## II. Analysis

The appellants raise two potential sources of district court jurisdiction over their suit against Japan. First, they argue the commercial activity exception to the FSIA applies retroactively, and Japan's operation of "comfort stations" was a commercial activity. Next, they contend Japan implicitly waived its sovereign immunity by violating *jus cogens* norms. Then, apparently assuming the courts have jurisdiction over Japan, they claim the Alien Tort Statute creates a cause of action for a violation of customary

international law. Finally, the appellants argue the political question doctrine is inapplicable to this case.

We hold that the commercial activity exception does not apply retroactively to events prior to May 19, 1952; we therefore do not consider whether the "comfort stations" were a "commercial activity" within the meaning of the FSIA. In any event, the 1951 Treaty of Peace between Japan and the Allied Powers created a settled expectation on the part of Japan that it would not be sued in the courts of the United States for actions it took during the prosecution of World War II, and the Congress has done nothing that leads us to believe it intended to upset that expectation. As to whether a violation of *jus cogens* norms constitutes an implied waiver of sovereign immunity pursuant to 28 U.S.C. § 1605(a)(1), our holding in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir.1994), is dispositive and remains good law; it therefore binds this panel of the court, as the appellants recognize.

We need not decide whether the Alien Tort Statute creates a cause of action because ***682** it clearly does not confer jurisdiction over a foreign sovereign. Nor, because the district court did not have jurisdiction of this case pursuant to the FSIA, need we consider whether the political question doctrine would also bar its adjudication.

A. Retroactive Application of the Commercial Activity Exception to the FSIA

[1] The FSIA, enacted in 1976, "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818 (1989); *see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 103 S.Ct. 1962, 1968-69, 76 L.Ed.2d 81 (1983) (FSIA contains "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities"). We have previously laid out at some length the history of the United States' approach to foreign sovereign immunity in general, culminating in the passage of the FSIA, *see Princz*, 26 F.3d at 1169-71; here we concentrate specifically upon the commercial activity exception.

Prior to 1952, the courts of the United States generally followed the doctrine of "absolute immunity," *see Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967- 68; Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 1869, 48 L.Ed.2d 301 (1976) (Appendix 2 to opinion of White, J.); that is, the courts almost always held a foreign sovereign immune from suit. *See Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967-68 ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches - in

particular, those of the Executive Branch - on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"). In 1952 the United States adopted the doctrine of "restrictive immunity," as set out in the Tate Letter and later codified in the FSIA. *See Verlinden*, 461 U.S. at 486-88, 103 S.Ct. at 1967-69. Under that doctrine "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487, 103 S.Ct. at 1968. This distinction served as the basis for the commercial activity exception in the FSIA, which allows a suit against a foreign sovereign to proceed if:

> the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In this case the appellants invoke the first and third conditions, claiming in connection with the former that Japan operated some comfort stations in two occupied territories of the United States, namely, Guam and the Phillippines.

[2] With this background in mind we consider whether 28 U.S.C. § 1605(a)(2) can be applied to events that occurred prior to 1952. This is a two- step inquiry. First, we must consider whether the commercial activity exception to the FSIA has retroactive effect.

***683** A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. As we have repeatedly counseled, the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

*INS v. St. Cyr,* 533 U.S. 289, 321, 121 S.Ct. 2271, 2290-91, 150 L.Ed.2d 347 (2001) (internal citations and quotation marks omitted). If we conclude the statute does not have a retroactive effect, then our inquiry ends and we apply the statute to events occurring prior to 1952. If, however, we determine the statute would have a retroactive effect, then we ask whether the "presumption against retroactive legislation that is deeply rooted in our jurisprudence" is overcome because the "Congress has clearly manifested its intent" to legislate retroactively. *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 946, 117 S.Ct. 1871, 1876, 138 L.Ed.2d 135 (1997) (internal citations and quotation marks omitted).

1. Would the commercial activity exception have retroactive effect?

With respect to the first inquiry, we agree with Japan and the United States that application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns. We further

agree with the United States that the Tate Letter shows the United States clearly changed its position in 1952 when it adopted the doctrine of restrictive immunity. Theretofore a foreign sovereign justifiably would have expected any suit in a court in the United States-whether based upon a public or a commercial act-to be dismissed unless the foreign sovereign consented to the suit. [FN*] As the Eleventh Circuit noted in a case involving a suit against the People's Republic of China for payment of defaulted bearer bonds issued by the Imperial Chinese Government in 1911:

> FN* Appellants argue that absolute immunity was generally accorded only to "friendly" foreign sovereigns in the pre-1952 era, *Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967-68, and that the State Department and courts would not have accorded Japan such status considering its posture in World War II. The Executive Branch, however, specifically decided to resolve all war-related claims against Japan through inter-governmental negotiations, *see infra* pages 684-685, and pre-FSIA courts would have considered themselves bound by a recommendation to accord Japan immunity from suit. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 533, 89 L.Ed. 729 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize").

> [T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.

*Jackson v. People's Republic of China,* 794 F.2d 1490, 1497-98 (1986); *accord Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir.1988) (per curiam) ("Such a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in American ***684** courts") (citations omitted). We conclude that, because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect.

For the contrary implication the appellants invoke a dictum in *Princz.* There we considered the possibility that application of the FSIA to pre-1952 events might not be of "genuinely retroactive effect," 26 F.3d at 1170 (internal citations and quotation marks omitted), because the statute is jurisdictional rather than substantive in nature and therefore "would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under [the substantive] law." *Id.* at 1171. We based this suggestion upon *Landgraf v. USI Film Products,* 511 U.S. 244, 274, 114 S.Ct. 1483, 1501-02,

128 L.Ed.2d 229 (1994), quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 203, 60 L.Ed. 409 (1916), in which the Supreme Court had remarked that a statute affecting jurisdiction "takes away no substantive right, but simply changes the tribunal that is to hear the case."

The Supreme Court has since clarified the situation in *Hughes Aircraft*, where the issue was whether a 1986 amendment expanding the jurisdiction of the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), could be applied to events occurring prior to 1986. 520 U.S. at 941-42, 117 S.Ct. at 1873-74. The Court held that, although the amendment affected only jurisdiction, its application in a suit concerning pre-enactment events would still have a retroactive effect:

> The 1986 amendment ... does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

*Id.* at 951, 117 S.Ct. at 1878 (emphasis in original).

The commercial activity exception to the FSIA, by qualifying what previously had been the absolute immunity of foreign sovereigns, also "creates jurisdiction where none previously existed" and therefore affects the substantive rights of the concerned parties.

We recognize the Ninth Circuit has recently held that the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), may be applied retroactively to activities of the German and Austrian governments in the 1930s and 1940s. *See Altmann v. Republic of Austria*, 317 F.3d 954 (2002). The Ninth Circuit reasoned "that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of 'grace and comity' for the wrongful appropriation of Jewish property." *Id.* at 965.

The decisions of the Ninth Circuit are, of course, not binding on this court. Regardless whether we would follow the *Altmann* decision, we do not find its reasoning applicable to this case because of the 1951 Treaty of Peace with Japan signed by Japan and the Allied Powers. 3 U.S.T. 3169. As the United States represents in its brief as amicus curiae, the Treaty "embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." We agree that the Treaty manifests the parties' intent to resolve matters arising from World War II without involving the courts ***685** of the United States (or of any signatory nation). In any event, the interpretation of the Treaty offered by the United States is a reasonable one. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight").

Article 14 of the Treaty expressly waives "all ... claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war" in return for a reciprocal waiver of claims by Japan and the right of the Allied Powers to seize Japanese assets within the Allies' respective jurisdictions. The Treaty further provides that Japan would resolve the war-related claims of other United Nations member states and their nationals "on the same or substantially the same terms," that is, through intergovernmental agreements, *see* Art. 26, as in fact it did. *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3; *see also* Agreement of the Settlement of Problems Concerning Property and Claims on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, 583 U.N.T.S. 173. As a result, Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiation. As a matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts. Because there was no similar treaty with Germany or Austria, and therefore no similar settled expectation, the opinion in *Altmann* is not relevant to the present case.

*Altmann* is not relevant to the present case for a second reason. In 1949 the State Department had issued a letter specifically stating that

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

*Altmann,* 317 F.3d at 966 (quoting Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein v. NV Nederlandsche- Amerikaansche,* 210 F.2d 375, 375-76 (2d Cir.1954) (per curiam)). Appellants do not point out, and we are not aware of, any similar statement of policy regarding the alleged acts of Japan in this case. The lack of such a statement not only distinguishes this case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of inter-governmental negotiations.

2. Did the Congress clearly intend to legislate retroactively?

Because the commercial activity exception would, if applied to events before 1952, upset Japan's settled expectations, we must determine whether the Congress manifested a clear intent to overcome the presumption against retroactive legislation. We find no clear indication the Congress***686** intended 28 U.S.C. § 1605(a)(2) to apply to events occurring

prior to 1952. The appellants point out, as we observed *obiter* in *Princz*, that the decision of the Congress, concurrent with the passage of the FSIA, to delete from 28 U.S.C. § 1332 the provision for diversity jurisdiction over a suit brought by a United States citizen against a foreign government might suggest the FSIA was intended to have retroactive effect - "[u]nless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts." 26 F.3d at 1170. This point remains valid as applied to events occurring between 1952 and 1976. The Congress's decision to amend 28 U.S.C. § 1332 cannot provide a basis, however, for altering sovereign immunity as it existed prior to 1952. The most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal law, not that the doctrine be applied to events that occurred before the United States first adopted it.

The appellants' last argument for retroactivity is based upon a sentence in the preamble of the FSIA: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. In *Princz* we observed that this statement "suggests that the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued." 26 F.3d at 1170. The preambular sentence falls far short, however, of stating the "clear intent" of the Congress that the statute be applied retroactively to events occurring before 1952. We agree with the United States that

the most probable meaning of the sentence is that the State Department would no longer consider petitions for sovereign immunity - which it had done routinely until 1952, when it issued the Tate Letter, and sometimes thereafter, *see Verlinden*, 461 U.S. at 487, 103 S.Ct. at 1968 - because henceforth the question of immunity would be addressed solely by the courts applying the new statute.

We conclude that the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), does not apply retroactively to events that predate the Tate Letter. Therefore, we need not consider whether the acts alleged in this case constitute a "commercial activity" within the meaning of 28 U.S.C. § 1605(a)(2).

B. Violation of a *Jus Cogens* Norm as a Waiver of Sovereign Immunity

[3] The appellants argue that Japan impliedly waived its sovereign immunity by violating *jus cogens* norms against sexual trafficking. "A *jus cogens* norm is a principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz*, 26 F.3d at 1173 (internal citations and quotation marks omitted). In *Princz*, however, this court soundly rejected that argument when we construed the "intentionality requirement implicit in" the waiver provision of the FSIA, 28 U.S.C. § 1605(a)(1), to require "the foreign government's having at some point indicated its amenability to suit." 26 F.3d at 1174. And a sovereign cannot realistically be said to manifest its intent to subject

itself to suit inside the United States when it violates a *jus cogens* norm outside the United States. *See id.*

The appellants therefore argue that we should revisit our decision in *Princz* due to intervening developments in international law. There is no need to revisit *Princz*, ***687** however; the fundamental premise of that decision - that a court cannot create a new exception to the general rule of immunity under the guise of an "implied waiver" - remains sound. *See id.* at 1174 n. 1 ("something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong"). No Supreme Court or circuit case has questioned this court's interpretation of 28 U.S.C. § 1605(a)(1) with respect to the violation of a *jus cogens* norm; indeed, two other circuit courts have since followed it, *see Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir.2001); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir.1996); and this panel is in any event bound by it.

C. The Alien Tort Statute

[4] The appellants maintain, and Japan denies, that the Alien Tort Statute, 28 U.S.C. § 1350, creates a cause of action for a violation of customary international law. *Compare, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995), *with Al Odah v. United States*, 321 F.3d 1134, 1145-49 (D.C.Cir.2003)

(Randolph, J., concurring). We need not reach this question because, as Japan and the United States point out, whatever else the Alien Tort Statute might do, it does not provide the courts with jurisdiction over a foreign sovereign. Only the FSIA can provide such jurisdiction. *See Amerada Hess*, 488 U.S. at 438, 109 S.Ct. at 690 ("We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607,' preclude a construction of the Alien Tort Statute that permits the instant suit"); *Verlinden*, 461 U.S. at 488, 103 S.Ct. at 1968-69. The appellants, in a footnote to their reply brief, acknowledge what they could hardly deny. Having found no jurisdictional predicate under the FSIA, we have no need to determine whether the ATS creates a cause of action for a violation of customary international law.

## III. Conclusion

In sum, we hold only three things: (1) the commercial activity exception to the FSIA does not apply retroactively to events, such as those alleged in this case, occurring before May 19, 1952, the date of the Tate Letter; (2) in any event, the 1951 Treaty created a settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II; and (3) a violation of *jus cogens* norms does not constitute an implied waiver of sovereign immunity under the FSIA. Much as we may feel for the plight of the appellants, the

courts of the United States simply are not authorized to hear their case. The judgment of the district court dismissing this case is, accordingly,

*Affirmed.*

United States Court of Appeals,
District of Columbia Circuit.

GEUM JOO HWANG, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

**No. 01-7169.**

Argued Dec. 10, 2002.
Decided June 27, 2003.
Rehearing and Rehearing En Banc Denied Aug. 22, 2003.

Before: GINSBURG, Chief Judge, and SENTELLE and TATEL, Circuit Judges.

**ORDER**

Upon consideration of appellants' petition for rehearing filed July 25, 2003, it is hereby **ORDERED** that the petition be denied.

**Per Curiam**

United States Court of Appeals,
District of Columbia Circuit.

GEUM JOO HWANG, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

**No. 01-7169.**

Argued Dec. 10, 2002.
Decided June 27, 2003.
Rehearing and Rehearing En Banc Denied Aug. 22, 2003.

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARMAND, and ROBERTS,* Circuit Judges.

**ORDER**

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is hereby

**ORDERED** that the petition be denied.

**Per Curiam**

* Circuit Judge Roberts did not participate in this matter.

United States District Court,
District of Columbia.

HWANG GEUM JOO, et al., Plaintiffs,
v.
JAPAN, Defendant.

**No. Civ.A. 00-02233(HHK).**

Oct. 4, 2001.

## MEMORANDUM OPINION

KENNEDY, District Judge.

This case is brought by fifteen foreign women, on behalf of themselves and others similarly situated, who allege that they were victims of sexual slavery and torture at the hands of the Japanese military before and during World War II. The fifteen named plaintiffs allege that this conduct occurred throughout Japanese-occupied Asia, including specifically in Japan, Korea, *55 China, the Philippines, Taiwan, Burma, Singapore, and the Dutch East Indies. Defendant Japan has moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [FN1] Upon consideration of Japan's motion to dismiss, plaintiffs' opposition thereto, and the record of this case, the court concludes that Japan's motion must be granted.

FN1. Japan's motion to dismiss the complaint asserts several grounds for dismissal: 1) that Japan enjoys sovereign immunity; 2) that the court lacks personal jurisdiction over Japan; 3) that this action presents a political question; 4) that even if jurisdiction exists this case should be dismissed on the grounds of forum nonconveniens; 5) that the international comity of nations requires dismissal; 6) that the statute of limitations has expired; and 7) that under the Alien Tort Claims Act these claims should be dismissed. Because Japan enjoys sovereign immunity and this action, in any event, presents a non-justiciable dispute, dismissal is required under Federal Rules of Civil Procedure 12(b)(1). Therefore, the court does not reach Japan's other grounds for dismissal.

## I. BACKGROUND

In the years leading up to and during World War II the world witnessed some of the worst atrocities ever committed by mankind. Fascist regimes spread virtually unchecked throughout the globe perpetrating such evil that the phrase "crimes against humanity" is hardly an adequate description. The international community has spent much of the last half century attempting to come to terms with these events. Indeed, in the last decade alone many steps were taken to obtain compensation for the victims. Much of this attention, however, has focused exclusively on the conduct of the Nazi regime in Europe.

Although forgotten by many in the Western Hemisphere, Asia was certainly not immune from the perils of fascism during this era. This case focuses attention on the egregious conduct of Japan during its conquest of Asia-- conduct that included sexual slavery and mass rape on an institutional scale. Plaintiffs allege that along with approximately 200,000 other women they were forced into sexual slavery by the Japanese Army between 1931 and 1945. These women, referred to as "comfort women," were recruited through forcible abductions, deception, and coercion. Once captured by the Japanese military they were taken to "comfort stations." "Comfort stations" were facilities seized or built by the military near the front lines specifically to house "comfort women." While at these facilities the women were repeatedly raped-- often by as many as thirty or forty men a day--tortured, beaten, mutilated, and sometimes murdered. The women were denied proper medical attention, shelter, and nutrition. Many of the women endured this brutal treatment for years. Plaintiffs estimate that only 25% to 35% of the "comfort women" survived the war, and those who did suffered health effects, including damage to reproductive organs and sexually transmitted diseases.

Plaintiffs assert that this conduct "was a systematic and carefully planned system ordered and executed by the Japanese government." Compl. ¶ 50. The "comfort stations" were for use by the Japanese military, and were regulated by the Japanese Army. Soldiers were charged a fee for access. The price charged depended on the woman's nationality, and at least a portion of the revenue went to the military. A soldier's length of stay and time of visit were

determined based upon his rank. The "comfort women" were treated as mere military supplies, and were even catalogued on supply lists under the heading of "ammunition."

The scope of this "premeditated master plan" to enslave and rape thousands of *56 women was immense, and no doubt required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel, weapons, all forms of land and sea transportation, and engineering and construction crews and material." Compl. ¶ ¶ 1, 56. In the decades after the war, however, Japan largely ignored and denied allegations concerning the "comfort women" system. Not until 1992 did the Japanese government officially acknowledge some involvement in the operation of "comfort stations." Since that time several officials have expressed their apologies for Japan's involvement, but the Japanese government has not taken full responsibility for its actions, and has not paid reparations to the "comfort women." Plaintiffs therefore filed this lawsuit seeking compensation for the inhumane treatment they experienced.

## II. ANALYSIS

[1][2] Because this suit is brought against Japan, jurisdiction is premised exclusively on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) ("We think that the text and structure of the FSIA demonstrate Congress'

intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."). In the FSIA Congress mandated presumptive immunity for foreign nations from lawsuits brought in the United States. However, the FSIA also provides several exceptions to this general grant of immunity. *See* 28 U.S.C. §§ 1605-1607. After the defendant has produced prima facie evidence supporting its entitlement to immunity, "the burden of going forward ... shift [s] to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity." H.R.Rep No. 94-1487, at 17, U.S.Code Cong. & Admin.News 1976, p. 6604 (1976). The defendant then has the ultimate burden of proving immunity. *See, e.g., Transamerican S.S. Corp. v. Somali Democratic Republic,* 767 F.2d 998, 1002 (D.C.Cir.1985). When "the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 40 (D.C.Cir.2000).

The defendant in this case, Japan, is presumptively immune from suit under the FSIA because it is a foreign state. In their papers plaintiffs argue that two exceptions to the FSIA apply. [FN2] The complaint specifically alleges that Japan "waived its immunity as to the claims of the 'Comfort Women' as described in *5728 U.S.C. § 1605(a)(1)" and that "the planning, establishment and operation of a network of 'comfort houses' is a commercial activity that is not subject to sovereign immunity pursuant to 28 U.S.C. § 1605(a)(2)."

Compl. § 5. Before addressing these two exceptions, it is appropriate to discuss briefly the threshold issue of whether the FSIA applies to events--such as the ones that are the subject of plaintiffs' complaint--which occurred before 1952.

FN2. At oral argument on the motion to dismiss, held two months after briefing concluded, plaintiffs for the first time sought to invoke an additional exception--the noncommercial tort exception contained in 28 U.S.C. § 1605(a)(5). The court will not consider the application of this exception. It was neither mentioned in the complaint nor raised in any of the papers filed in opposition to Japan's motion to dismiss. Moreover, it was not raised in plaintiffs' Motion for Declaratory Judgment seeking a declaration that Japan could not claim sovereign immunity in its defense of this suit. Like the complaint, this filing asserted that Japan waived its immunity under § 1605(a)(1), and the third clause of § 1605(a)(2). Therefore, because the noncommercial tort exception was raised for the first time at oral argument, it will not be considered. *Cf. Corson & Gruman Co. v. NLRB,* 899 F.2d 47, 50 n. 4 (D.C.Cir.1990) ("We require petitioners and appelants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond.")

**A. Retroactive Application of the FSIA**

Until 1952 foreign sovereigns were granted immunity at the discretion of the executive branch. The State Department generally granted immunity to friendly foreign sovereigns in all actions brought in United States courts. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). In 1952, Jack B. Tate, then-Acting Legal Adviser, Department of State, wrote what is now known as the "Tate Letter" to Acting Attorney General Philip B. Perlman, stating that the State Department would adopt a restrictive theory of foreign sovereign immunity. *Id.* at 487 n. 9, 103 S.Ct. 1962. From that point forward immunity was granted only in suits involving a foreign sovereign's public acts.

In an effort to reduce the political and diplomatic pressure foreign governments often placed on the State Department to grant immunity, Congress sought to codify the standards and conditions for determining when sovereign immunity would be denied. In 1976, Congress enacted the FSIA "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that ... decisions are made on purely legal grounds and under procedures that insure due process.'" *Id.* at 488, 103 S.Ct. 1962, (quoting H.R.Rep. No. 94-1487, at 7 (1976) reprinted in 1976 U.S.C.C.A.N. 6604). Because the FSIA codified standards in place as of 1952, it is generally accepted that the FSIA applies to all events occurring from 1952 to the present. The controversy lies in whether the FSIA can be applied to events that occurred before 1952.

The D.C. Circuit has never expressly addressed the issue of whether the FSIA applies to pre-1952 events. Although, in *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170-71 (D.C.Cir.1994), the court did comment on the issue. Without deciding the question the court provided some significant observations. Focusing on *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), [FN3] it reasoned that the FSIA might be applied retroactively to pre-1952 events because doing so would not affect the foreign sovereign's substantive rights. The court stated in dicta that applying the FSIA to Germany's acts during World War II "would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law." ***58** *Princz*, 26 F.3d at 1171. This analysis tends to reflect the line of cases that have confronted the issue since the 1994 decision in *Landgraf*. *See Altmann v. Republic of Austria*, 142 F.Supp.2d 1187, 1198-1201 (C.D.Cal.2001) (holding that the FSIA applied to pre-1952 events); *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F.Supp.2d 943 (N.D.Ill.1999) (adopting the reasoning in *Princz* and concluding that the FSIA applied to pre-1952 events).

> FN3. In *Landgraf*, a case dealing generally with retroactive application of statutes, the Supreme Court held that,
> only a statute that would impair rights a party possessed when he acted, increase a party's liability

> for past conduct, or impose new duties with respect to transactions already completed is truly retroactive. A statute affecting jurisdiction, on the other hand, usually take[s] away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. *Princz*, 26 F.3d at 1170 (internal quotations and citations omitted).

Although the only two circuits that expressly addressed this issue held that the FSIA did not apply to pre-1952 events, *see Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.1988); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir.1986), both of these cases were decided prior to *Landgraf* and *Princz*. Additionally, at least two district court judges in this circuit have also decided the issue, and both found that the FSIA did not apply to pre-1952 events. *See Lin v. Government of Japan*, C.A. No. 92-2574, 1994 WL 193948, at *2 (D.D.C. May 6, 1994) (Hens-Green, J.); *Djordjevich v. Federal Republic of Germany*, 827 F.Supp. 814 (D.D.C.1993) (Hens-Green, J.), *aff'd on other grounds*, 1997 WL 530499, 124 F.3d 1309 (D.C.Cir.1997); *Slade v. United States of Mexico*, 617 F.Supp. 351, 355 (D.D.C.1985) (Greene, J.), *aff'd without opinion*, 790 F.2d 163 (D.C.Cir.1986). Again, however, these cases were decided prior to *Princz*.

As was the case in *Princz*, this court need not "decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case." *Princz*, 26 F.3d at 1171; *see also Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 n. 3 (7th Cir.2001) ("We need not decide whether the pre-1952 law or the less stringent theory of sovereign immunity codified in the FSIA applies because, ... Sampson's suit against Germany is barred even under the lower standards of the FSIA."). Assuming that the FSIA does govern plaintiffs' claims, none of its exceptions apply. On the other hand the if FSIA does not apply, and if Japan is not entitled to sovereign immunity under pre-1952 law, plaintiffs' claims must still be dismissed because they are nonjusticiable.

**B. Exceptions to the FSIA**

Based upon the waiver and commercial activity exceptions plaintiffs advance three arguments in support of Japan's amenability to suit. First, plaintiffs claim that Japan explicitly waived immunity in the Potsdam Declaration signed after World War II. Second, plaintiffs argue that the acts in question constitute a violation of the *jus cogens* norms of the law of nations, and as such immunity was implicitly waived. And third, plaintiffs assert that the acts were in connection with commercial activities outside the United States that had a direct effect inside the United States. Because at this stage of the litigation Japan only challenges the legal sufficiency of plaintiffs' allegations, the court will assume the allegations in the complaint are true in order to

determine if these FSIA exceptions apply. *See Phoenix Consulting*, 216 F.3d at 40.

Section 1605(a) of the FSIA provides, *inter alia*, that

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the ***59** United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a).

*1. Explicit Waiver Under the Potsdam Declaration*

[3][4] Relying on § 1605(a)(1), plaintiffs first argue that Japan explicitly waived its sovereign immunity by agreeing to the terms of the Potsdam Declaration. However, because case law states that such a waiver needs to be clear, intentional, and unambiguous, plaintiffs' argument must be rejected. The Potsdam Declaration does not explicitly state that Japan waived its immunity or intended to subject itself to

civil suits in United States courts, and therefore does not constitute an explicit waiver of immunity under § 1605(a)(1). Plaintiffs rely on a paragraph of the Potsdam Declaration that states:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people.

Potsdam Declaration, July 26, 1945. Plaintiffs also seek support from a post-World War II case in which the Supreme Court noted that "Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war." *In re Yamashita*, 327 U.S. 1, 13, 66 S.Ct. 340, 90 L.Ed. 499 (1946). While the statement of the Supreme Court is entirely consistent with the language of the Potsdam Declaration, neither of these sources support plaintiffs' position that Japan explicitly waived its immunity.

[5] In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), the Supreme Court stated that it did not "see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Id.* at 442-43, 109 S.Ct. 683. An "[e]xplicit waiver is generally found when the [ ] language itself clearly and unambiguously

states that the parties intended waiver, and therefore adjudication, in the United States." *Commercial Corp. Sovrybflot v. Corporacion de Fomento de la Produccion*, 980 F.Supp. 710, 712 (S.D.N.Y.1997) (quoting *Eaglet Corp. Ltd. v. Banco Central De Nicaragua*, 839 F.Supp. 232, 234 (S.D.N.Y.1993)); *see, e.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C.Cir.1990) (holding that Iran did not waive its sovereign immunity in the Treaty of Amity, which extended only to enterprises of Iran doing business in the U.S. and not to Iran itself); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n. 10 (D.C.Cir.1982) (stating that "Congress contemplated waivers of a much more specific and explicit nature than the one MINE constructs from the operation of this Guinean law").

In addition, as Japan argues, the Potsdam provision holds individuals accountable for war crimes, but cannot extend to holding the government of Japan liable in a civil suit. Similarly, in *Von Dardel v. Union of Soviet Socialist Republics*, 736 F.Supp. 1 (D.D.C.1990), a district court ***60** found that the Vienna Convention "requires jurisdiction over *crimes*, not civil suits, and in any event not necessarily over foreign states. The 1973 Convention contains no terms at all which conflict with sovereign immunity." *Id.* at 5.

Therefore, because the law requires that an explicit waiver must be unambiguous and intentional, the court concludes that Japan's agreement with the terms of the Potsdam Declaration does not constitute an explicit waiver under § 1605(a)(1).

2. Jus Cogens *Violations*

[6][7][8] Plaintiffs next contend that Japan's *jus cogens* violations constitute an implied waiver of sovereign immunity under § 1605(a)(1). [FN4] However, this argument is contrary to the law of this circuit. In *Princz* the D.C. Circuit squarely held that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1).... [A]n implied waiver depends upon the foreign government's having at some point indicated its amenability to suit." *Princz*, 26 F.3d at 1174. Acknowledging that "it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich," the D.C. Circuit nonetheless concluded that *jus cogens* violations did not constitute an implied waiver under § 1605(a)(1). *Id.* This conclusion is the same one reached by the three other circuit courts that have ruled on the issue. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir.2001) (concluding that "Congress did not create an exception to foreign sovereign immunity under the FSIA for violations *of jus cogens* norms"); *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193, 202 (2d Cir.1999) (holding that a waiver could not be implied from a sovereign's *jus cogens* violation); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir.1996) (same); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir.1992) ("[W]e conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The

fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.")

> FN4. "A *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted....' Such peremptory norms are 'nonderogable and enjoy the highest status within international law,' they 'prevail over and invalidate international agreements and other rules of international law in conflict with them,' and they are 'subject to modification only by a subsequent norm of international law having the same character.' " According to one authority, a state violates *jus cogens*, as currently defined, if it: 'practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.' *Princz*, 26 F.3d at 1173 (internal citations omitted).

Quite telling of the weakness of their argument is the fact that plaintiffs have failed to cite any United States court decision, nor is the court aware of any, holding that *jus cogens* violations constitute a waiver under the FSIA. Indeed,

plaintiffs acknowledge the D.C. Circuit's holding in *Princz,* but ask the court to disregard it. Instead, plaintiffs argue that this court should adopt the reasoning in Judge Wald's dissent in *Princz,* suggesting that the majority's opinion is no longer good law.

This argument must fail. The majority's opinion in *Princz* unquestionably remains ***61** good law. Indeed, in *Creighton Ltd. v. Government of the State of Qatar,* 181 F.3d 118 (D.C.Cir.1999), the D.C. Circuit recently reaffirmed the underlying rationale of *Princz.* The court stated that "we have ... followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly. In particular, we have held that implicit in § 1605(a)(1) is the requirement that the foreign state have intended to waive its sovereign immunity." *Creighton,* 181 F.3d at 122 (citing *Princz,* 26 F.3d at 1174) (internal citation omitted).

In light of the binding precedent of the D.C. Circuit in *Princz,* the court concludes that Japan's *jus cogens* violations do not constitute an implied waiver under § 1605(a)(1).

*3. Commercial Activity Exception*

Lastly, plaintiffs maintain that this case falls within the FSIA exception provided in the third clause of § 1605(a)(2). Plaintiffs argue that the present action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); *see* Pls.' Mot.Decl.J. at 31.

Plaintiffs' argument is based on the allegation that the "comfort stations" were merely "state-supervised brothels," and therefore constitute commercial activities that occurred outside the United States. In an effort to satisfy the second prong, plaintiffs advance three theories explaining how these "commercial activities" had a "direct effect" inside the United States. They first argue that "comfort stations" were established inside Guam and the Philippines. Because these were United States territories at the time, plaintiffs maintain there was a direct effect in the United States. Second, plaintiffs assert that after World War II the Japanese territories occupied by the United States military became part of the United States. Therefore, the burden of repatriating, debriefing, housing, clothing, and treating "comfort women" in these areas was a direct effect in the United States. Third, plaintiffs claim that the alleged use of "comfort women" by United States servicemen after the war constituted a direct effect in the United States. *See* Pls' Mot.Decl.J. at 34-38.

[9][10] In order to evaluate the applicability of § 1605(a)(2), the court must first determine if the alleged conduct can be considered a commercial activity within the meaning of the FSIA. Plaintiffs argue that the "comfort women" system constituted a commercial activity under § 1605(a)(2). Pls.' Mot.Decl.J. at 31. Both Japan and the United States [FN5] disagree, maintaining that Japan's conduct does not fall within the commercial activity exception. The FSIA defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be

determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court has elaborated on this definition, stating that

> FN5. Pursuant to 28 U.S.C. § 517, the United States filed a statement of interest in this case. In this document the United States agrees with Japan's position that plaintiffs' claims are barred by sovereign immunity and present a nonjusticiable political question.

> when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover ... the question is not whether the ***62** foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed.1990).

*Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

After *Weltover*, the Supreme Court next examined the commercial activity exception in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The plaintiff in *Nelson* was recruited in the United States for a job

at a Saudi-government-owned hospital in Saudi Arabia. *See id.* at 352. He subsequently accepted a position in which he monitored certain hospital equipment and facilities to ensure patient safety. *See id.* While performing this task he discovered "safety defects" at the hospital, and reported the problems to Saudi government officials. *See id. at* 353, 113 S.Ct. 1471. The Saudi government responded by imprisoning Nelson. While in prison he was allegedly tortured and interrogated repeatedly. *See id.* After his release Nelson and his wife filed a lawsuit against Saudi Arabia. They sought to overcome Saudi Arabia's sovereign immunity by arguing under the first clause of § 1605(a)(2) that their claims were "based upon a commercial activity carried on in the United States." The commercial activity upon which they relied was the recruitment of Nelson in the United States. *See id.* at 354-55.

The Supreme Court rejected this argument. Writing for the Court Justice Souter reasoned that the conduct the Nelsons challenged, wrongful arrest, imprisonment, and torture,

> boil[ed] down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.

*Id.* at 361-62, 113 S.Ct. 1471 (internal citations and footnote omitted). The court next rejected the argument that because Nelson was imprisoned and tortured in retaliation for

reporting safety violations at a hospital, "the mistreatment was consequently commercial." *Id.* This argument failed because it went to the purpose of the Saudi Government's conduct, the very inquiry that the FSIA "renders irrelevant." *Id.* at 363, 113 S.Ct. 1471. Addressing this issue the court stated that "[w]hatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject-matter jurisdiction of the United States courts under the Act." *Id.* at 363, 113 S.Ct. 1471

Shortly after *Nelson* was decided, the D.C. Circuit analyzed § 1605(a)(2) in *Cicippio v. Islamic Republic of Iran,* 30 F.3d 164 (D.C.Cir.1994). Joseph Cicippio was abducted in Lebanon by Islamic terrorists. After his release he filed a suit against Iran, alleging that the terrorists were Iranian agents. Although Iran enjoyed immunity under the FSIA, Cicippio sought to invoke the commercial activity exception. Cicippio argued that because the hostage taking was intended to "gain economic advantages" it constituted a commercial activity. *Id.* at 166.

***63** However, relying on the FSIA, *Weltover,* and *Nelson,* the court refused to consider the motives behind the kidnapping, and focused instead on the issue of whether "hostage taking itself can be described as a commercial activity--without regard to its purpose." *Id.* at 167. Consistent with the FSIA, and without eschewing the directives of *Weltover* and *Nelson,* the court found that "[a]lthough the purpose and perhaps the illegal character of

the alleged acts are irrelevant in judging their commercial character, ... the context in which the acts take place must be germane." *Id.* at 168. The FSIA, the court observed, "was obviously designed to prevent the foreign sovereign from casting a governmental purpose, which always can be found, as a cloak of protection over typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts." *Id.* Given this framework, the court concluded that the alleged kidnapping was not a commercial act within the meaning of the FSIA. [FN6]

> FN6. Ultimately Cicippio did bring a successful suit against Iran, but only after Congress amended the FSIA in 1996 by adding an exception permitting suits against countries designated as state sponsors of terrorism. *See* 28 U.S.C. § 1605(a)(7); *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62 (D.D.C.1998).

[11] Applying the standards set forth in 28 U.S.C. § 1603(d), *Weltover*, and *Nelson*, this court agrees with Japan and the United States that plaintiffs' claims do not arise in connection with a commercial activity. Although it is undeniable that prostitution and brothels routinely exist as commercial ventures engaged in by private parties, Japan's alleged conduct did not occur in this context. The complaint alleges that plaintiffs "were taken from their home countries occupied by Japan," and "pursuant to a premeditated master plan" forced into sexual slavery. Compl. ¶ 1. Plaintiffs

further allege that this system "was planned, ordered, established, and controlled by Japan for the benefit of its soldiers and certain others." *Id.* ¶ 27. According to plaintiffs, the "comfort stations" were buildings near the front lines of the war that "were either appropriated by the Japanese military or makeshift constructions built by the army specifically to house 'comfort women' " *Id.* ¶ 26. Many of the "comfort women" were abducted from their homes, "often in large scale raids in countries under Japanese control." *Id.* ¶ 25. Plaintiffs even acknowledge that "[t]he 'comfort women' system required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel, weapons, all forms of land and sea transportation, and engineering and construction crews and material." *Id.* ¶ 56.

The described conduct is unquestionably barbaric, but certainly is not commercial in nature. Japan's use of its war-time military to impose "a premeditated master plan" of sexual slavery upon the women of occupied Asian countries might be characterized properly as a war crime or a crime against humanity. This conduct, however, was not in connection with a commercial activity. [FN7] As plaintiffs correctly recognize, this system "required" the resources at the government's disposal. Such conduct is not typically engaged in by private players in the market.

FN7. At oral argument plaintiffs' counsel also invoked the first clause of the commercial activity exception. The court will not address this issue

because it was raised for the first time at oral argument. Needless to say, in light of the court's conclusion that the "comfort women" system was not a commercial activity, plaintiffs' position with respect to the first clause of § 1605(a)(2) would also fail.

*64 Plaintiffs seek to avoid this conclusion by alleging that "soldiers using the 'comfort women' were normally charged a fixed price" and that "a portion of the revenue was taken by the military." *Id.* ¶ 55. This argument, too, must be rejected. The mere fact that soldiers allegedly paid money in order to access "comfort stations," is insufficient to justify characterizing the challenged conduct as commercial in nature. As the D.C. Circuit noted in *Cicippio*, the fact that ransom "was allegedly sought from relatives of the hostages could not make an ordinary kidnapping a commercial act any more than murder by itself would be treated as a commercial activity merely because the killer is paid." *Cicippio*, 30 F.3d at 168. Here, as in *Nelson*, the challenged conduct "boils down" to an abuse--albeit an extremely outrageous and inhumane one--of Japan's military power, an activity that is "peculiarly sovereign in nature." *Nelson*, 507 U.S. at 362, 113 S.Ct. 1471; *see also Doe v. Unocal Corp.*, 963 F.Supp. 880, 887-88 (C.D.Cal.1997) (relying on *Nelson* to dismiss claims against the Burmese government where the plaintiffs alleged that the Government used violence, intimidation, and slavery in connection with a commercial pipeline project). Therefore, because the court concludes that Japan's operation of "comfort stations" was not a commercial activity within

the meaning of the FSIA, the commercial activity exception does not apply in this case. [FN8]

> FN8. The court, therefore, need not determine whether Japan's alleged conduct caused a "direct effect" in the United States.

Accordingly, as the court is persuaded that none of the exceptions to the FSIA relied upon by plaintiffs are applicable, Japan's motion to dismiss for lack of subject matter jurisdiction must be granted.

**C. Political Question Doctrine**

Even if Japan did not enjoy sovereign immunity, this case must also be dismissed because it is nonjusticiable. Japan argues that plaintiffs' claims present a nonjusticiable political question. In its statement of interest the United States also argues that the political question doctrine requires dismissal. [FN9] The roots of the political question doctrine can be traced back to early federal jurisprudence. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169, 2 L.Ed. 60 (1803), Chief Justice Marshall wrote for the Supreme Court that "[q]uestions, in their nature political ... can never be made in this court." Of course, this statement is not entirely accurate, as federal courts routinely adjudicate cases of a political nature. *See, e.g., Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229, 106 S.Ct. 2860, 92

L.Ed.2d 166 (1986) (noting that "not every matter touching on politics is a political question").

> FN9. Although both Japan and the United States maintain that this case should be dismissed as a political question, the focus of their arguments is somewhat different. Japan first argues that "[c]laims for [w]ar [r]eparations [a]re [n]on-justiciable as a[m]atter of [l]aw," and that "individuals may not assert war-related claims except as authorized by a treaty of peace." Def.'s Mot. to Dismiss at 16, 18. The United States, on the other hand, while also arguing that this case is a political question, does not rely on the proposition asserted by Japan that war reparations are always nonjusticiable. Like the United States, the court concludes based on the specific circumstances of this case that plaintiffs' claims are nonjusticiable, and therefore need not address Japan's position regarding the justiciability of war reparations in general.

The Supreme Court has articulated two primary justifications for the political question doctrine: "the appropriateness under our system of government of attributing finality to the action of the political ***65** departments and also the lack of satisfactory criteria for a judicial determination." *Baker v. Carr,* 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (quoting *Coleman v. Miller,* 307 U.S. 433, 454-55, 59 S.Ct. 972, 83 L.Ed. 1385

(1939)) (internal quotations omitted). The first of these considerations "is primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, 82 S.Ct. 691, while the second is grounded in the inherent "limitation[s] of the judiciary as a decisional body." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir.1978).

Certain types of cases often have been found to present political questions. *See Baker*, 369 U.S. at 211-22, 82 S.Ct. 691. One such category is cases involving questions of foreign relations. It is well- established that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative--'the political'--departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918). Accordingly, "many [foreign relations] questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211, 82 S.Ct. 691 (citing *Doe v. Braden*, 57 U.S. (16 How.) 635, 657, 14 L.Ed. 1090 (1853)). The Supreme Court further has cautioned that decisions relating to foreign policy "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

[12] However, it is equally clear that not all cases implicating foreign relations present political questions. *See Baker,* 369 U.S. at 211, 82 S.Ct. 691 (noting that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). For example, courts certainly possess "the authority to construe treaties and executive agreements." *Japan Whaling Ass'n,* 478 U.S. at 230, 106 S.Ct. 2860. Further guidance in determining what constitutes a political question comes from *Baker v. Carr,* in which the Supreme Court announced six factors that must be considered when deciding if a case presents a political question. In *Baker* the Court held that:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;* or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker,* 369 U.S. at 217, 82 S.Ct. 691 (emphasis added). If any of these six factors "is inextricable from the case at bar," then "dismissal for non- justiciability on the ground of a political question's presence" is appropriate. *Id.* In

*Goldwater v. Carter*, Justice Powell summed up the *Baker* criteria as follows: "(i) Does the issue involve resolution of questions committed by the ***66** text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Goldwater v. Carter*, 444 U.S. 996, 998, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Powell, J., concurring); *see also Antolok v. United States*, 873 F.2d 369, 381 (D.C.Cir.1989) (applying the analysis discussed by Justice Powell in *Goldwater* ).

[13] Although adjudication of the present case would certainly implicate United States foreign policy, this fact alone does not justify dismissal. However, prudential concerns together with the court's lack of judicial expertise strongly militate in favor of dismissal. While to some extent each of the factors identified in *Baker* is inextricable from the present case, there can be no doubt that resolution of plaintiffs' claims would require "an initial policy determination of a kind clearly for nonjudicial discretion," and be hindered by a "lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217, 82 S.Ct. 691. Not only would the court have to move beyond its "judicial expertise," but "prudential considerations counsel against judicial intervention." *Goldwater*, 444 U.S. at 998, 100 S.Ct. 533 (Powell, J., concurring).

Thirty-five years ago the D.C. Circuit was confronted with a case that presented a similar dilemma. In *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C.Cir.1966), two

United States citizens brought a lawsuit seeking reparations for damages caused by the Nazis during World War II. After the war the United States Government was in possession of various assets that had previously belonged to companies that participated in the "Nazi conspiracy." *Kelberine,* 363 F.2d at 991-92. One such company, Interhandel, sued to recover this property. The government ultimately agreed that some of the property belonging to Interhandel would be sold at auction. The auction occurred, and Interhandel was due to receive a payment. On behalf of themselves and other victims of the Nazi atrocities, the plaintiffs sued to stop this payment. They argued that the auction proceeds should have been redirected to the victims of the Nazi regime.

In affirming the district court's dismissal of the complaint the D.C. Circuit reasoned in part that the plaintiffs' "thesis is not presently susceptible of judicial implementation." *Id.* at 995. Although the court's opinion did not explicitly cite *Baker v. Carr,* its conclusion was premised on the reality that

> [a]s presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States.... The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought-- adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power--is too complicated, too costly, to justify

> undertaking by a court without legislative provision of the means wherewith to proceed.

*Id.* This rationale is even more persuasive now, decades later, when plaintiffs seek to adjudicate conduct sixty to seventy years after it occurred. Additionally, unlike in *Kelberine* where the defendant was a corporation, here the defendant is the Government of Japan.

As the United States points out in its papers, "[t]he history of Japan's war claims settlements with the United States and its allies, including the Philippines, ***67** and various Chinese and Korean political entities is complex." U.S. St. of Interest at 23. The 1951 Treaty of Peace with Japan resolved all "claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, art. 14(b), T.I.A.S. No. 2490. The Philippines signed and ratified this agreement, thereby settling the claims of its nationals. Japan, as it was required to do pursuant to the 1951 Treaty of Peace, subsequently entered into agreements with other nations as well. *See* U.S. St. of Interest at 25-28 Specifically, Korea and China both negotiated separate agreements addressing war claims. *See id.* Although as plaintiffs argue the claims of the "comfort women" might not have been specifically mentioned in these treaties, the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan.

There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly a half century later. Just as the agreements and treaties made with Japan after World War II were

negotiated at the government-to-government level, so too should the current claims of the "comfort women" be addressed directly between governments. Several district courts have recently reached this same conclusion with respect to reparations for victims of the Nazi regime. These courts concluded that "the post-war claims settlement regime had been exclusively constructed by political branches, and that it was not the place of courts to resolve [these] claims." *In re Nazi Era Cases Against German Defendants Litigation,* 129 F.Supp.2d. 370, 377-78 (D.N.J.2001); *see also Burger-Fischer v. DeGussa AG,* 65 F.Supp.2d 248 (D.N.J.1999) (holding that certain claims of World War II slave laborers present nonjusticiable political questions); *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424 (D.N.J.1999) (same). Although the cases addressing reparations for victims of Nazi atrocities arose in a slightly different factual context than that of the "comfort women," the result nonetheless remains the same. The court therefore concludes that even if Japan did not enjoy sovereign immunity, plaintiffs' claims are nonjusticiable and must be dismissed.

## III. CONCLUSION

For the foregoing reasons, this court is unable to provide plaintiffs the redress they seek and surely deserve. Consequently, Japan's motion to dismiss is granted. An appropriate order accompanies this memorandum.

## JUDGMENT

Pursuant to Fed.R.Civ.P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 4th day of October, 2001, hereby

**ORDERED and ADJUDGED** that defendant's motion to dismiss is granted and the complaint in this case is **DISMISSED.**

# TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries, who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

## CHAPTER I
## PEACE

### Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

## CHAPTER II

## TERRITORY

### Article 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and

Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military

Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

## CHAPTER III

## SECURITY

### Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other

manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements

which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of July 26, 1945, dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

## CHAPTER IV
## POLITICAL AND ECONOMIC CLAUSES

### Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treaties or conventions so notified shall continue in force or be revived subject only to such amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so

notified shall be considered as having been continued in *force or revived three months after the date of notification* and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the Conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of January 20, 1930, and its Annexes, including the Trust Agreement, dated May 17, 1930; the Convention of January 20, 1930, respecting the Bank for International Settlements; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris within six months of the first coming into force of the present Treaty its renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in

respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on the recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty

(1) accord to each of the Allied Powers, its nationals, products and vessels

(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;

(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests - such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participation in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;

(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or most-favored-nation treatment, only to the extent that the Allied Power concerned accords Japan national treatment or most-favored-nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons

domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power of Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93 thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

## CHAPTER V

## CLAIMS AND PROPERTY

### Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for

all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights

and interests specified in this sub-paragraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belonged to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) The following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;

(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and consular functions, owned by Japanese diplomatic and consular personnel;

(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan,

except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan, or any paper evidence thereof; provided that this exception shall only apply to obligations of Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration. If any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in sub-paragraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

## Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended,

provided such nationals have applied for such benefits within the time limits prescribed therein.

(c) (i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 6, 1941, in respect to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen, or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941, until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

## Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue

hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14 (a) 2(II) (ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied Powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between December 7, 1941, and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may

be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and

civilian internees in the hands of the Allied Powers, but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

## Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945 to dispose of

those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

## CHAPTER VI

## SETTLEMENT OF DISPUTES

Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946, a general declaration accepting the jurisdiction, without special

agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

## CHAPTER VII

## FINAL CLAUSES

### Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force for each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of

America not later than three years after the date of deposit of Japan's ratification.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

## Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

## Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

IN FAITH WHEREOF the undersigned Plenipotentiaries have signed the present Treaty.

DONE at the city of San Francisco this eighth day of September 1951, in the English, French, and Spanish languages, all being equally authentic, and in the Japanese language.

FOR ARGENTINA:

(Signature)

FOR AUSTRALIA:

(Signature)

FOR THE KINGDOM OF BELGIUM:

(Signature)

(Signature)

FOR BOLIVIA:

(Signature)

FOR BRAZIL:

(Signature)

(Signature)

FOR CAMBODIA:

(Signature)

FOR CANADA:

(Signature)

(Signature)

FOR CEYLON:

(Signature)

(Signature)

(Signature)

FOR CHILE:

(Signature)

FOR COLOMBIA:

(Signature)

(Signature)

FOR COSTA RICA:

(Signature)

(Signature)

(Signature)

FOR CUBA:

(Signature)

(Signature)

(Signature)

FOR THE DOMINICAN REPUBLIC:

(Signature)

(Signature)

FOR ECUADOR:

(Signature)

(Signature)

FOR EGYPT:

(Signature)

FOR EL SALVADOR:

(Signature)

(Signature)

FOR ETHIOPIA:

(Signature)

FOR FRANCE:

(Signature)

(Signature)

(Signature)

FOR GREECE:

(Signature)

FOR GUATEMALA:

(Signature)

(Signature)

(Signature)

FOR HAITI:

(Signature)

(Signature)

FOR HONDURAS:

(Signature)

(Signature)

(Signature)

FOR INDONESIA:

(Signature)

FOR IRAN:

(Signature)

FOR IRAQ:

(Signature)

FOR LAOS:

(Signature)

FOR LEBANON:

(Signature)

FOR LIBERIA:

(Signature)

(Signature)

(Signature)

(Signature)

FOR THE GRAND DUCHY OF LUXEMBOURG:

(Signature)

FOR MEXICO:

(Signature)

(Signature)

(Signature)

FOR THE KINGDOM OF THE NETHERLANDS:

(Signature)

(Signature)

FOR NEW ZEALAND:

(Signature)

FOR NICARAGUA:

(Signature)

(Signature)

FOR THE KINGDOM OF NORWAY:

(Signature)

FOR PAKISTAN:

(Signature)

FOR PANAMA:

(Signature)

(Signature)

(Signature)

(Signature)

FOR PARAGUAY:

(Signature)

FOR PERU:

(Signature)

FOR THE REPUBLIC OF THE PHILIPPINES:

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

FOR SAUDI ARABIA:

(Signature)

FOR SYRIA:

(Signature)

FOR THE REPUBLIC OF TURKEY:

(Signature)

FOR THE UNION OF SOUTH AFRICA:

(Signature)

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

(Signature)

(Signature)

(Signature)

FOR THE UNITED STATES OF AMERICA:

(Signature)

(Signature)

(Signature)

(Signature)

FOR URUGUAY:

(Signature)

FOR VENEZUELA:

(Signature)

(Signature)

FOR VIET NAM:

(Signature)

(Signature)

(Signature)

(Signature)

FOR JAPAN:

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

# No. 1858. TREATY OF PEACE[1] BETWEEN THE REPUBLIC OF CHINA AND JAPAN. SIGNED AT TAIPEI, ON 28 APRIL 1952

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The Republic of China and Japan,

Considering their mutual desire for good neighborliness in view of their historical and cultural ties and geographical proximity;

Realizing the importance of their close cooperation to the promotion of their common welfare and to the maintenance of international peace and security;

Recognizing the need of a settlement of problems that have arisen as a result of the existence of a state of war between them;

Have resolved to conclude a Treaty of Peace and have accordingly appointed as their Plenipotentiaries,

His Excellency the President of the Republic of China:
Mr. Yeh Kung Chao;

The Government of Japan:
Mr. Isao Kawada;

Who, having communicated to each other their full powers found to be in good and due form, have agreed upon the following articles:

---

[1] Came into force on 5 August 1952 by the exchange of the instruments of ratification at Taipei, in accordance with article XIII.

*Article I*

The state of war between the Republic of China and Japan is terminated as from the date on which the present Treaty enters into force.

*Article II*

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951[2] (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.

*Article III*

The disposition of property of Japan and of its nationals in Taiwan (Formosa) and Penghu (the Pescadores), and their claims, including debts, against the authorities of the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores) and the residents thereof, and the disposition in Japan of property of such authorities and residents and their claims, including debts, against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan. The terms nationals and residents whenever used in the present Treaty include juridical persons.

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[2] United Nations, *Treaty Series*, Vol. 136, p. 45.

*Article IV*

It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war.

*Article V*

It is recognized that under the provisions of Article 10 of the San Francisco Treaty, Japan has renounced all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901,[1] and all annexes, notes and documents supplementary thereto, and has agreed to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

*Article VI*

(*a*) The Republic of China and Japan will be guided by the principles of Article 2 of the Charter of the United Nations in their mutual relations.

(*b*) The Republic of China and Japan will cooperate in accordance with the principles of the Charter of the United Nations and, in particular, will promote their common welfare through friendly cooperation in the economic field.

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[1] De Martens, *Nouveau Recueil général de Traités* deuxième série, tome XXXII, p. 94.

*Article VII*

The Republic of China and Japan will endeavor to conclude, as soon as possible, a treaty or agreement to place their trading, maritime and other commercial relations on a stable and friendly basis.

*Article VIII*

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement relating to civil air transport.

*Article IX*

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

*Article X*

For the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and juridical persons of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

*Article XI*

Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.

*Article XII*

Any dispute that may arise out of the interpretation or application of the present Treaty shall be settled by negotiation or by other pacific means.

*Article XIII*

The present Treaty shall be ratified and the instruments of ratification shall be exchanged at Taipei as soon as possible. The present Treaty shall enter into force as from the date on which such instruments of ratification are exchanged.

*Article XIV*

The present Treaty shall be in the Chinese, Japanese and English languages. In case of any divergence of interpretation, the English text shall prevail.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

DONE in duplicate at Taipei, this Twenty Eighth day of the Fourth month of the Forty First year of the Republic of China corresponding to the Twenty Eighth day of the

Fourth month of the Twenty Seventh year of Showa of Japan and to the Twenty Eighth day of April in the year One Thousand Nine Hundred and Fifty Two.

| For the Republic of China: | For Japan: |
|---|---|
| (*Signed*) YEH KUNG CHAO | (*Signed*) ISAO KAWADA |

## PROTOCOL

At the moment of signing this day the Treaty of Peace between the Republic of China and Japan (hereinafter referred to as the present Treaty), the undersigned Plenipotentiaries have agreed upon the following terms which shall constitute an integral part of the present Treaty:

1. The application of Article XI of the present Treaty shall be subject to the following understandings:

   (*a*) Wherever a period is stipulated in the San Francisco Treaty during which Japan assumes an obligation or undertaking, such period shall, in respect of any part of the territories of the Republic of China, commence immediately when the present Treaty becomes applicable to such part of the territories.

   (*b*) As a sign of magnanimity and good will towards the Japanese people, the Republic of China voluntarily waives the benefit of the services to be made available by Japan pursuant to Article 14(*a*) 1 of the San Francisco Treaty.

   (*c*) Articles 11 and 18 of the San Francisco Treaty shall be excluded from the operation of Article XI of the present Treaty.

2. The commerce and navigation between the Republic of China and Japan shall be governed by the following Arrangements:

(*a*) Each Party will mutually accord to nationals, products and vessels of the other Party:

(i) Most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods; and

(ii) Most-favored-nation treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests – such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (including those relating to intangible property and excluding those with respect to mining), participation in juridical entities, and generally the conduct of all kinds of business and professional activities with the exception of financial (including insurance) activities and those reserved by either Party exclusively to its nationals.

(*b*) Whenever the grant of most-favored-nation treatment by either Party to the other Party, concerning rights to property,

participation in juridical entities and conduct of business and professional activities, as specified in sub-paragraph (*a*)(ii) of this paragraph, amounts in effect to the grant of national treatment, such Party shall not be obligated to grant more favorable treatment than that granted by the other Party under most-favored-nation treatment.

(*c*) External purchases and sales of government trading enterprises shall be based solely on commercial considerations.

(*d*) In the application of the present Arrangements, it is understood

(i) that vessels of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and products of the Republic of China shall be deemed to include all those originating in Taiwan (Formosa) and Penghu (the Pescadores); and

(ii) that a discriminatory measure shall not be considered to derogate from the grant of treatments prescribed above, if such measure is based on an exception customarily provided for in the commercial treaties of the Party applying it, or on the need to safeguard that

Party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

The Arrangements set forth in this paragraph shall remain in force for a period of one year as from the date on which the present Treaty enters into force.

DONE in duplicate at Taipei, this Twenty Eighth day of the Fourth month of the Forty First year of the Republic of China corresponding to the Twenty Eighth day of the Fourth month of the Twenty Seventh year of Showa of Japan and to the Twenty Eighth day of April in the year One Thousand Nine Hundred and Fifty Two.

(*Signed*) YEH KUNG CHAO (*Signed*) ISAO KAWADA

[TRANSLATION[1] – TRADUCTION[2]]

## No. 8473. AGREEMENT[3] ON THE SETTLEMENT OF PROBLEMS CONCERNING PROPERTY AND CLAIMS AND ON ECONOMIC CO-OPERATION BETWEEN JAPAN AND THE REPUBLIC OF KOREA. SIGNED AT TOKYO, ON 22 JUNE 1965

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Japan and the Republic of Korea,

Desiring to settle [the] problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and

Desiring to promote the economic co-operation between the two countries; Have agreed as follows:

### *Article I*

1. To the Republic of Korea Japan shall:

(*a*) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥ 108,000,000,000), *in grants* [on a non-repayable basis] within the period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year *shall be limited to*

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[1] See footnote 1, p. 130 of this volume.

[2] Voir note 2, p. 130 de ce volume.

[3] Came into force on 18 December 1965, the date of the exchange of the instruments of ratification at Seoul, in accordance with article IV.

[shall be such] such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the said amount, the remainder shall be added to the amounts of the supplies for the next and subsequent years. However, *the ceiling on*[*] the amount of the supply for any one year can be *raised* [increased] by agreement between the Governments of the Contracting Parties.

(*b*) Extend long-term and low-interest loans up to such amount in yen as shall be equivalent to two hundred million United States dollars ($200,000,000) at present computed at seventy-two billion yen (¥72,000,000,000), which the Government of the Republic of Korea may request and which shall be used for the procurement by the Republic of Korea of the products of Japan and the services of the Japanese people necessary in implementing the projects to be determined in accordance with arrangements to be concluded under the provisions of paragraph 3 of the present Article, within the period of ten years from the date of the entry into force of the present Agreement. Such loans shall be extended by the Overseas Economic Co-operation Fund of Japan, and the Government of Japan shall take necessary measures in order that the said Fund will be able to secure the necessary funds for implementing the loans evenly each year.

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[*] Does not appear in the English translation provided by the Government of the Republic of Korea

Ces mots n'apparaissent pas clans la traduction anglaise fournie par le Gouvernement de la République de Corée.

The above-mentioned supply and loans should be such that will be conducive to the economic development of the Republic of Korea.

2. The Governments of the Contracting Parties shall establish, as an organ of consultation between the two Governments with powers to recommend on matters concerning the implementation of the provisions of the present Article, a Joint Committee composed of representatives of the two Governments.

3. The Governments of the Contracting Parties shall conclude necessary arrangements for the implementation of the provisions of the present Article.

*Article II*

1. The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

2. The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):

(*a*) Property, rights and interests of those nationals of either Contracting Party who have ever resided in the other country in the period between August 15, 1947 and the date of the signing of the present Agreement;

(*b*) Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 15, 1945.

3. Subject to the provisions of paragraph 2, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of the other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date.

*Article III*

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.

2. Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the

third arbitrator shall not be a national of either Contracting Party.

3. If, within the periods respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be designated by the government of a third country to be determined upon consultation between the governments so chosen.

4. The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.

*Article IV*

The present Agreement shall be ratified. The instruments of ratification shall be exchanged at Seoul as soon as possible. The present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate at Tokyo, in the Japanese and Korean languages, both being equally authentic, this twenty-second day of June of the year one thousand nine hundred and sixty-five.

For Japan:
Etsusaburo SHIINA
Shinichi TAHASUGI

For the Republic of Korea:
TONG WON LEE
DONG JO KIM

## FIRST PROTOCOL

At the time of the signing of the Agreement on the Settlement of [the] Problem Concerning Property and Claims and on the Economic Co-operation between Japan and the Republic of Korea (hereinafter referred to as "the Agreement"), the undersigned, being duly authorized by their respective Governments, have agreed on the following provisions, which shall be deemed to be an integral part of the Agreement, concerning the implementation of the provisions of Article I, paragraph 1(*a*) of the Agreement.

### *Article I*

An annual schedule specifying the products and services to be supplied by Japan (hereinafter referred to as "the Schedule") shall be prepared by the Government of the Republic of Korea, and shall be fixed through consultation between the Governments of the Contracting Parties.

### *Article II*

1. The products to be supplied by Japan shall be capital goods and such other products to be agreed upon by the two Governments.

2. The supply of the products of Japan and the services of the Japanese people shall be carried out in such a manner as will not *substantially* [remarkably] prejudice the normal trade between Japan and the Republic of Korea or impose additional foreign exchange burden on Japan.

*Article III*

1. The Mission mentioned in Article V, paragraph 1 or any person who is authorized by the Government of the Republic of Korea shall conclude contracts directly with any Japanese national or any juridical person controlled by Japanese nationals for the acquisition of products and services in accordance with the Schedule.

2. The contracts (including modifications thereof) mentioned in paragraph 1 shall conform with: (i) the provisions of Article I, paragraph 1(*a*) of the Agreement and of the present Protocol; (ii) the provisions of such arrangements as may be made by the two Governments for the implementation of the provisions of Article I, paragraph 1(*a*) of the Agreement and of the present Protocol; and (iii) the Schedule then applicable. These contracts shall be forwarded to the Government of Japan for verification as to the conformity of the same with the above-mentioned criteria. Such verification shall as a rule be effected within fourteen days. In case such verification is not affected within the stipulated period, such contract shall be referred to the Joint Committee mentioned in Article I, paragraph 2 of the Agreement, and shall be acted upon in accordance with the recommendations of the joint Committee.

Such recommendations shall be made within a period of thirty days following the receipt of the contract by the Joint Committee. A contract verified in the manner provided in the present paragraph shall hereinafter be referred to as a "Contract".

3. Every Contract shall contain a provision to the effect that disputes arising out of or in connection with such Contract shall, at the request of either party thereto, be referred for settlement to an arbitration board of commerce in accordance with such arrangement as may be made between the two Governments. The two Governments shall take necessary measures to make final and enforceable all arbitration awards duly rendered.

4. Notwithstanding the provisions of paragraph 1, in case the supply of the products and services is deemed impossible under a Contract, they may be supplied by agreement between the two Governments without Contract.

*Article IV*

1. The Government of Japan shall, through procedures to be determined under the provisions of Article VII, make payments to cover the obligations incurred under Contracts by the Mission mentioned in Article V, paragraph 1 or by any person authorized by the Government of the Republic of Korea as well as the expenses for the supply of products and services referred to in paragraph 4 of the preceding Article. Those payments shall be made in Japanese yen.

2. By and upon making a payment on the basis of the provisions of paragraph I, Japan shall be deemed to

have supplied the Republic of Korea with the products and services thus paid for, in accordance with the provisions of Article I, paragraph 1(*a*) of the Agreement.

*Article V*

1. The Government of the Republic of Korea shall establish its mission (hereinafter referred to as "the Mission") in Japan.

2. The Mission shall be charged with the implementation of the provisions of Article I, paragraph 1(*a*) of the Agreement and of the present Protocol, and its functions shall include the following:

(*a*) Presentation to the Government of Japan of a Schedule prepared by the Government of the Republic of Korea ;

(*b*) Conclusion and implementation of the contracts for the Government of the Republic of Korea ; and

(*c*) Forwarding to the Government of Japan to obtain verification of the contracts mentioned in (*b*) above and of the contracts concluded by the persons who are authorized by the Government of the Republic of Korea.

3. Such office or offices of the Mission in Japan as are necessary for the effective performance of its functions and are used exclusively for that purpose shall be established at Tokyo and/or other places to be agreed upon between the two Governments.

4. The premises of the office or offices, including the archives, of the Mission shall be inviolable. The Mission may use cipher. The real estate which is owned by the Mission and used directly for the performance of its

functions shall be exempt from the Tax on Acquisition of Real Property and the Fixed Assets Tax. The income of the Mission which may be derived from the performance of its functions shall be exempt from taxation in Japan. The property imported for the official use of the Mission shall be exempt from customs duties and any other charges imposed on or in connection with importation.

5. The Mission shall be accorded such administrative assistance by the Government of Japan as other foreign missions usually enjoy and as may be required for the effective performance of its functions.

6. The Chief and two senior officials of the Mission as well as the chiefs of such offices as may be established in pursuance of paragraph 3, who are nationals of the Republic of Korea, shall be accorded diplomatic privileges and immunities generally recognized under international law and usage. If it is deemed necessary for the effective performance of the functions of the Mission, the number of such senior officials may be increased by agreement between the two Governments.

7. Other members of the staff of the Mission who are nationals of the Republic of Korea and who are not ordinarily resident in Japan shall be exempt from taxation in Japan upon emoluments which they may receive in the discharge of their duties, and, in accordance with the laws and regulations of Japan, from customs duties and any other charges imposed on or in connection with importation of property for their personal use.

8. In the event that any dispute arising out of or in connection with a Contract has not been settled by arbitration or that the arbitration award rendered has not been complied with, the matter may be taken, as a last

resort, to the appropriate court located in the area where the Contract concerned has been concluded. In such a case and solely for the purpose of whatever judicial proceedings may be necessary, the person holding the position of Chief of the Legal Section of the Mission may sue or be sued with regard to the contracts mentioned in paragraph 2(*b*), and accordingly he may be served with process and other pleadings at his office in the Mission. However, he shall be exempt from the obligation to deposit bonds for the costs of legal proceedings. While the Mission enjoys inviolability and immunity as provided for in paragraphs 4 and 6, the final decision rendered by the appropriate judicial body in such a case will be accepted by the Mission as binding upon it.

9. In the enforcement of any final court decision, the land and buildings, as well as the movable property therein, owned by the Mission and used for the performance of its functions shall in no case be subject to execution.

*Article VI*

1. The two Governments shall take necessary measures for the smooth and effective supply of the products and services.

2. Japanese nationals who may be needed in the Republic of Korea in connection with the supply of the products and services shall be accorded necessary facilities for their entry into, departure from, and stay in the Republic of Korea for the performance of their work.

3. Japanese nationals and juridical persons shall be exempt from taxation in the Republic of Korea with

respect to their income derived from the supply of the products and services.

4. The products supplied by Japan shall not be re-exported from the territory of the Republic of Korea.

5. With respect to the transportation and insurance of the products to be supplied by Japan, the Government of either Contracting Party shall not take discriminatory measures, directly or indirectly, against the nationals and juridical persons of the other Contracting Party, which may hamper fair and free competition.

6. The provisions of the present Article shall be applicable to the procurement of products and services by loans as provided for in Article I, paragraph 1(*b*) of the Agreement.

*Article VII*

Procedure and other details for the implementation of the present Protocol shall be agreed upon through consultation between the two Governments.

IN WITNESS WHEREOF the undersigned have signed the present Protocol.

Done in duplicate at Tokyo, in the Japanese and Korean languages, both being equally authentic, this twenty-second day of June of the year one thousand nine hundred and sixty-five.

For Japan:
Etsusaburo SHIINA
Shinichi TAKASUGI

For the Republic of Korea:
TONG WON LEE
DONG JO KIM

## SECOND PROTOCOL

At the time of *the* signing of the Agreement on the Settlement of [the] Problem Concerning Property and Claims and on the Economic Co-operation between Japan and the Republic of Korea (hereinafter referred to as "the Agreement"), the undersigned, being duly authorized by their respective Governments, have further agreed on the following provisions which shall be considered integral parts of the Agreement:

### *Article I*

The Republic of Korea shall repay forty-five million seven hundred and twenty-nine thousand three hundred and ninety-eight dollars and eight cents in United States dollars ($45,729,398.08), confirmed between the Governments of the Contracting Parties as the balance, in favour of Japan, of the Open Account between Japan and the Republic of Korea in the exchange of notes dated April 22, 1961, in the following installments within the period of ten (10) years from the date of the entry into force of the Agreement. In this case, no interest shall be charged.

The amount of each of the first nine annual installments: four million five hundred and seventy-three thousand United States dollar ($4,573,000).

The amount of the tenth annual installment : four million five hundred and seventy-two thousand three hundred and ninety-eight dollars and eight cents in United States dollars ($4,572,398.08).

*Article II*

In case request is made by the Republic of Korea with respect to an annual installment referred to in the preceding Article, the supply of the products and services under the provisions of Article I, paragraph 1(*a*) of the Agreement and the payments of the installments under the provisions of the preceding Article shall be deemed as having been carried out to the amount equivalent to that so requested. The amount of the supply of products and services under the provisions of Article I, paragraph 1(*a*) of the Agreement and the ceiling on the amount of the supply for the year concerned shall be thereby deducted by the said amount of money notwithstanding the provisions of paragraph 1(*a*) of the said Article.

*Article III*

Concerning the repayment of the Balance in favour of Japan referred to in Article I, the Republic of Korea shall pay the first annual installment on the date of the entry into force of the Agreement, and the second and subsequent annual installments shall be paid on or before the same date each year as that for the first payment.

*Article IV*

In view of the fiscal practices of Japan, the request by the Government of the Republic of Korea mentioned in Article II shall be made, with respect to the installment to be paid on the date provided for in the preceding Article, by October 1 of the year preceding the calendar year in which the Japanese fiscal year, to which such date for payment belongs, begins. Request, however, with respect to the first payment (and to the second payment in case

the provisions of the foregoing sentence are not applicable) shall be made on the date of the entry into force of the Agreement.

*Article V*

The request by the Republic of Korea may be made with respect to the whole or part of the installment for each year referred to in Article I.

*Article VI*

In the event that the Republic of Korea does not make such request by the date provided for in Article IV and fails to make the payment of the whole or part of the installment by the date for payment provided for in Article III, it shall be deemed that the Republic of Korea has made the request mentioned in Article II with respect to the whole or part of the said installment.

IN WITNESS WHEREOF the undersigned have signed the present Protocol.

DONE in duplicate at Tokyo, in the Japanese and Korean languages, both being equally authentic, this twenty-second day of June of the year one thousand nine hundred and sixty-five.

For Japan:
Etsusaburo SHIINA
Shinichi TAKASUGI

For the Republic of Korea:
TONG WON LEE
DONG JO KIM

# The Ministry of Foreign Affairs of Japan

## Joint Communique of the Government of Japan and the Government of the People's Republic of China

September 29, 1972

Prime Minister Kakuei Tanaka of Japan visited the People's Republic of China at the invitation of Premier of the State Council Chou En-lai of the People's Republic of China from September 25 to September 30, 1972. Accompanying Prime Minister Tanaka were Minister for Foreign Affairs Masayoshi Ohira, Chief Cabinet Secretary Susumu Nikaido and other government officials.

Chairman Mao Tse-tung met Prime Minister Kakuei Tanaka on September 27. They had an earnest and friendly conversation.

Prime Minister Tanaka and Minister for Foreign Affairs Ohira had an earnest and frank exchange of views with Premier Chou En-lai and Minister for Foreign Affairs Chi Peng-fei in a friendly atmosphere throughout on the question of the normalization of relations between Japan and China and other problems between the two countries as well as on other matters of interest to both sides, and agreed to issue the following Joint Communique of the two Governments:

Japan and China are neighbouring countries, separated only by a strip of water with a long history of traditional friendship. The peoples of the two countries earnestly desire to put an end to the abnormal state of affairs that has hitherto existed between the two countries. The realization of the aspiration of the two peoples for the termination of the state of war and the normalization of

relations between Japan and China will add a new page to the annals of relations between the two countries.

The Japanese side is keenly conscious of the responsibility for the serious damage that Japan caused in the past to the Chinese people through war, and deeply reproaches itself. Further, the Japanese side reaffirms its position that it intends to realize the normalization of relations between the two countries from the stand of fully understanding "the three principles for the restoration of relations" put forward by the Government of the People's Republic of China. The Chinese side expresses its welcome for this.

In spite of the differences in their social systems existing between the two countries, the two countries should, and can, establish relations of peace and friendship. The normalization of relations and development of good-neighborly and friendly relations between the two countries are in the interests of the two peoples and will contribute to the relaxation of tension in Asia and peace in the world.

1. The abnormal state of affairs that has hitherto existed between Japan and the People's Republic of China is terminated on the date on which this Joint Communique is issued.

2. The Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China.

3. The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the

Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Postsdam Proclamation.

4. The Government of Japan and the Government of People's Republic of China have decided to establish diplomatic relations as from September 29, 1972. The two Governments have decided to take all necessary measures for the establishment and the performance of the functions of each other's embassy in their respective capitals in accordance with international law and practice, and to exchange ambassadors as speedily as possible.

5. The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.

6. The Government of Japan and the Government of the People's Republic of China agree to establish relations of perpetual peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence.

The two Governments confirm that, in conformity with the foregoing principles and the principles of the Charter of the United Nations, Japan and China shall in their mutual relations settle all disputes by peaceful means and shall refrain from the use or threat of force.

7. The normalization of relations between Japan and China is not directed against any third country. Neither of the two countries should seek hegemony in the Asia-Pacific region

and each is opposed to efforts by any other country or group of countries to establish such hegemony.

8. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to solidifying and developing the relations of peace and friendship between the two countries, the two Governments will enter into negotiations for the purpose of concluding a treaty of peace and friendship.

9. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to further promoting relations between the two countries and to expanding interchanges of people, the two Governments will, as necessary and taking account of the existing non-governmental arrangements, erter into negotiations for the purpose of concluding agreements concerning such matters as trade, shipping, aviation, and fisheries.

Done at Peking, September 29, 1972

Prime Minister of Japan

Minister for Foreign Affairs of Japan

Premier of the State Council of the People's Republic of China

Minister for Foreign Affairs of the People's Republic of China

[TRANSLATION – TRADUCTION]

# TREATY[1] OF PEACE AND FRIENDSHIP BETWEEN JAPAN AND THE PEOPLE'S REPUBLIC OF CHINA

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Japan and the People's Republic of China,

Having recalled with satisfaction that, since the issuance of the joint statement by the Government of Japan and the Government of the People's Republic of China on 29 September 1972 at Beijing, friendly relations between the Governments and peoples of the two countries have developed extensively on a new basis,

Affirming that the aforementioned joint statement constitutes the basis for relations of peace and friendship between the two countries and that the principles set out in that statement should be strictly observed,

Affirming that the Charter of the United Nations should be fully respected, Desiring to contribute to the peace and security of Asia and the world,

Seeking to strengthen and develop peaceful and friendly relations between the two countries,

Have decided to conclude a treaty of peace and friendship and have, for this purpose, appointed as their Plenipotentiaries:

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[1] Came into force on 23 October 1978 by the exchange of the instruments of ratification, which took place at Tokyo, in accordance with article 5 (1).

For Japan, the Minister for Foreign Affairs, Sunao Sonoda;

For the People's Republic of China, the Minister for Foreign Affairs, Huang Hua.

The Plenipotentiaries of both Parties, having exchanged their full powers and found them in good and due form, have agreed as follows:

*Article I.* 1. The Contracting Parties shall develop lasting relations of peace and friendship between the two countries on the basis of mutual respect for the principles of sovereignty and territorial integrity, mutual non-aggression, non-intervention in each other's internal affairs, mutual benefit and peaceful co-existence.

2. In accordance with the aforementioned principles and the principles of the Charter of the United Nations, the Contracting Parties affirm that, in their mutual relations, they will use peaceful means to settle all disputes and will refrain from the use of force or threats of the use thereof.

*Article 2.* The Contracting Parties declare that neither Party shall seek hegemony within the Asian and Pacific region or in any other region and that both shall oppose any attempt by any other country or group of countries to establish such hegemony.

*Article 3.* The Contracting Parties, motivated by the spirit of good-neighbourliness and friendship and in accordance with the principles of mutual benefit and non-interference in each other's internal affairs, shall foster contacts and endeavours involving the peoples of the two countries with a view to furthering economic and cultural relations between the two countries.

*Article 4.* This Treaty shall not affect the relations which either Contracting Party maintains with third countries.

*Article 5.* 1. This Treaty is subject to ratification and shall enter into force on the day of the exchange of instruments of ratification at Tokyo. This Treaty shall remain in force for 10 years and thereafter until the statement of termination provided for in paragraph 2 of this article is made.

2. Upon the expiration of the initial ten-year period or at any time thereafter, either Contracting Party may terminate this Treaty by informing the other Contracting Party in writing one year beforehand of its intention to do so.

IN WITNESS WHEREOF, the Plenipotentiaries have signed this Treaty and affixed thereto their seals.

DONE at Beijing on 12 August 1978, in duplicate, in the Japanese and Chinese languages, both texts being equally authentic.

For Japan:
SUNAO SONODA

For the People's Republic of China:
HUANG HUA

No. 05-543

IN THE

# Supreme Court of the United States

HWANG GEUM JOO, *et al.*,
*Petitioners,*

v.

GOVERNMENT OF JAPAN,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION

CRAIG A. HOOVER*
JONATHAN S. FRANKLIN
AUDREY J. ANDERSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5694

*Counsel of Record

*Counsel for Respondent*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTION PRESENTED

Whether the D.C. Circuit correctly concluded that claims by foreign nationals against the government of Japan for the wartime conduct of its former military during World War II raise non-justiciable political questions in light of the foreign policy of the United States—as embodied in the 1951 Treaty of Peace With Japan and informed by the expressed views of the Executive—that all such claims are to be resolved through government-to-government negotiations.

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GOVERNMENT OF JAPAN,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION

## INTRODUCTION

This case involves claims by foreign nationals residing abroad against the sovereign nation of Japan based on the wartime conduct of its former military during World War II.[1] The D.C. Circuit found that these claims were non-justiciable in light of the circumstances of this case and the foreign policy of the United States as embodied in the landmark 1951 Treaty of Peace With Japan (the "Treaty of Peace") and informed by the views of the Executive. The petition posits a decision that does not exist. The D.C. Circuit did *not* hold that "claims related to conduct during a war" are "constitu-

[1] For purposes of recusal, counsel for Japan states that Hogan & Hartson L.L.P. began representing Japan in this matter in 2000.

tionally committed to the Executive Branch *as a categorical matter*." Pet. 8 (emphasis added). Far from it, the court instead considered "'the *particular question*' posed in this case * * * namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the [petitioners'] claims." Pet. App. 8a (quoting *Baker* v. *Carr*, 369 U.S. 186, 211 (1962)) (emphasis added).

That decision faithfully applied the precedents of this Court regarding both the political question doctrine and the respect due to the Executive's treaty interpretation and foreign policy views; it conflicts with no decision of any other court; and it is plainly correct. That other courts of appeals have reached various conclusions as to the justiciability of different claims relating to different treaties and different factual contexts does not reflect a conflict in the standards governing the application of the political question doctrine or deference to the Executive. Rather, it shows that the lower courts are properly reviewing these questions on a case-by-case basis. *See Baker*, 369 U.S. at 211. The issues in this case are also unlikely to recur because they involve the application of a unique treaty and because the war that is the basis for this case ended in a complete and final resolution more than 50 years ago. This case should now end as well.

## STATEMENT OF THE CASE

**The Treaty and the Foreign Policy It Embodies.** At the end of World War II, the United States recognized that it would be impossible for Japan to make full reparation for the damage its former military had caused. Determined not to repeat the mistakes of the Treaty of Versailles—which contained onerous reparations provisions that were largely believed to have led directly to the rise of fascism in Europe—the United States adopted a policy of resolving all Japanese war-related claims through government-to-government negotiations, with the goal of reintegrating Japan into the community of democratic nations without imposing

crushing financial liability. *See generally Mitsubishi Materials Corp.* v. *Superior Court*, 6 Cal. Rptr. 3d 159, 166-169 (Ct. App. 2003); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 946-947 (N.D. Cal. 2000), *aff'd*, 324 F.3d 692 (9th Cir. 2003).[2] That policy has proved extremely successful, as Japan has not only become a productive and peaceful member of the international community, but one of this Nation's most important and trusted allies.

The Treaty of Peace, signed September 8, 1951, was the culmination of that policy. *See* Treaty of Peace With Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (Pet. App. 70a-108a). That Treaty, entered into by Japan, the United States, and forty-four other Allied nations, formally concluded World War II. Among other things, the Treaty expressly waived "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Treaty of Peace art. 14(b) (Pet. App. 85a). In return, Japan agreed to numerous conditions and restrictions, including a reciprocal

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[2] *See also* Mem. by the Sec. of State to the President (Aug. 7, 1951), *reprinted in* 6 For. Rel. of the U.S. 1951, at 1245 (1977) (statement of chief treaty negotiator John Foster Dulles that requiring Versailles-type reparations would "endanger Japan's survival as a member of the free world"); U.S. Dep't of State, *Record of the Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace With Japan* 33-34 (1951) ("*Record of Proceedings*") (statement by President Truman that Treaty "does not saddle the Japanese people with a hopeless burden of reparations which would crush their economy in the years to come"); S. Rep. No. 82-2 at 13 (1952) (statement of Senate Foreign Relations Committee that treaty embodies principle that "[r]eparations for war losses is a governmental matter to be settled between governments" and that "[i]t is the duty and responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable").

waiver and the right of the Allied Powers to seize Japanese assets within their respective jurisdictions. *Id.* art. 14(a).

The Treaty's basic principles also apply to claims of nationals of other countries which, for various reasons, could not be signatories. For example, Korea could not sign because it had not been an independent nation before the war. *See Record of Proceedings* at 84. But Korea was "to all intents and purposes a treaty power." S. Rep. No. 82-2 at 14. China, too, could not sign, but for a different reason—because the Allies could not agree on whether China was properly represented by the government of Taiwan (the Republic of China) or that of the People's Republic of China. *Id.*

The Treaty, however, directly addresses both Korea and China, making clear that claims of Korean and Chinese nationals are to be addressed only through government-to-government negotiations. Pursuant to Articles 4(a) and 26, the Treaty obligates Japan to enter into bilateral agreements with Chinese and Korean representatives resolving claims issues. Among other provisions, the Treaty expressly provides that Japan would resolve the war-related claims of other nations through bilateral treaties "on the same or substantially the same terms" as those in the Treaty. Treaty of Peace art. 26 (Pet. App. 95a). Article 4(a) likewise provided that the "claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities." *Id.* art. 4(a) (Pet. App. 73a). In the words of the D.C. Circuit, the Treaty of Peace "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." Pet App. at 28a (emphasis added; quotation omitted).

**District Court Decision.** More than fifty years after the end of the war, petitioners (foreign nationals who reside abroad) brought suit in the District of Columbia against

Japan for war reparations arising out of events that occurred in Asia during World War II. Petitioners invoked subject matter jurisdiction under the "commercial activity" exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(2). Japan moved to dismiss the complaint on numerous alternative grounds: (1) that Japan was entitled to sovereign immunity; (2) that the complaint presented non-justiciable political questions; (3) that petitioners' claims were barred by the applicable statute of limitations; (4) that petitioners' case was not cognizable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350; (5) that the comity of nations doctrine required dismissal; and (6) that the doctrine of *forum non conveniens* required dismissal.

The District Court dismissed the complaint. The court first held that Japan was entitled to immunity under the FSIA. Rejecting petitioners' arguments regarding the "commercial activity" exception, the court held that their claims " 'boil[] down' to an abuse * * * of Japan's military power" that is "certainly * * * not commercial in nature." Pet. App. 60a, 59a. In accord with the complaint's own allegations, the court found that the conduct alleged "might be characterized properly as a war crime or crime against humanity" that is "not typically engaged in by private players in the market." *Id.* at 59a.[3]

The court also held alternatively that petitioners' claims were barred by the political question doctrine. Noting that "the series of treaties signed [by Japan] after the war was

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[3] *See, e.g.*, Pet. App. 40a, 58a (noting allegations of complaint that Japan engaged in a "premeditated master plan" to force women into sexual slavery, which was "a systematic and carefully planned system ordered and executed by the Japanese Government"); *id.* at 59a (noting allegations of complaint that these military activities required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel [and] weapons").

clearly aimed at resolving all war claims against Japan," the court held that "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly half a century later." *Id.* at 67a. Rather, petitioners' claims were matters to be addressed solely "at the government-to-government level." *Id.* at 68a.

**D.C. Circuit Decisions.** Petitioners appealed that judgment. The D.C. Circuit first affirmed the dismissal of the complaint on the single ground (which the District Court had not reached) that the FSIA's commercial activity exception did not apply retroactively to claims against Japan involving wartime events that occurred before 1952. Pet. App. 18a. This Court vacated that decision on the retroactivity of the FSIA, and remanded the case to the D.C. Circuit for further consideration in light of *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004). *See* Pet. App. 17a.

While this Court in *Altmann* held that the FSIA applies retroactively to conduct before 1952, it also made clear that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases," noting that such an opinion by the State Department "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702 (citations and footnote omitted). The concurring opinion of Justices Breyer and Souter further emphasized that a statement of interest filed by the United States could "refer, not only to sovereign immunity, but also to other grounds for dismissal, such as * * * the nonjusticiable nature * * * of the matters at issue." *Id.* at 714 (Breyer, J., concurring). That opinion referenced the District Court's decision in *this very case* as one in which the claims asserted arguably "raise political questions that were settled by international agreements." *Id.* (citing *Hwang Geum Joo* v. *Japan*, 172 F. Supp. 2d 52, 58, 64-67 (D.D.C. 2001)) (additional citations omitted).

In both the District Court and on appeal, the United States government, through the Departments of State and Justice, took the position that Japan was entitled to sovereign immunity and that petitioners' claims were non-justiciable because the Treaty of Peace embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through inter-governmental negotiations not private lawsuits.[4] Moreover, the Executive also informed the courts that the relief sought by petitioners "would have serious repercussions for our foreign policy toward Japan and other nations" and "also could have serious implications for stability in the region." U.S. Dist. Ct. Statement of Interest at 1, 35. For example, the United States noted that North Koreans are among the putative class of victims in this case and that permitting North Koreans to sue Japan in the United States for wartime conduct "could pose a significant risk of seriously disrupting international relations in East Asia at a time when such relations are already extremely sensitive." U.S. Supp. Ct. App. Br. 8. Specifically, the United States explained that "[t]he availability of a U.S. forum to litigate wartime claims could reasonably be expected to impair discussions between Japan and North Korea regarding normalization of relations, talks that have grown to encompass North Korea's nuclear weapons program." *Id.* at 9.

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[4] *See, e.g.*, U.S. Supp. Ct. App. Br. 2 ("the Executive, with the advice and consent of the Senate, has made a foreign policy determination that all World War II-related claims against Japan should be resolved exclusively through intergovernmental agreements. That determination is reflected in the 1951 Treaty of Peace * * *.") (filed Nov. 23, 2004); U.S. Dist. Ct. Statement of Interest 3 ("In order to decide the claims here, the Court would have to question the policy judgment and wisdom of the President, Congress and our Allies in entering the 1951 Treaty with Japan") (filed Apr. 27, 2001).

On remand, the D.C. Circuit (per Chief Judge Ginsburg and Judges Sentelle and Tatel) again unanimously affirmed the dismissal of the complaint, agreeing with the District Court that the complaint presents nonjusticiable political questions. Pet. App. 15a. In reaching this conclusion, the Court of Appeals considered "'the particular question posed,' * * * namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the [petitioners'] claims." Pet. App. 8a (quoting *Baker*, 368 U.S. at 211). The court noted that the Treaty of Peace expressly waives, in Article 14, "all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* (internal quotations and citation omitted).

The D.C. Circuit went on to hold that the political question doctrine barred the claims of the petitioners from China, Taiwan, and South Korea, which were not formal parties to the Treaty but nevertheless encompassed within its reach. The Court of Appeals found it "pellucidly clear the Allied Powers intended that *all* war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits." Pet. App. 9a-10a (emphasis added). That Article 26 of the Treaty of Peace obligated Japan to enter into bilateral treaties with non-Allied states on the same or similar terms as the Treaty, "indicates the Allied Powers expected Japan to resolve other states' claims, like their own, through government-to-government agreement." *Id.* at 10a. Noting petitioners' own concession that it seems "anomalous" to bar war claims of *U.S.* nationals but nevertheless permit such claims of *foreign* nationals, the court remarked that "'anomalous' is an understatement." *Id.* at 9a.

The D.C. Circuit declined petitioners' invitation to decide whether bilateral treaties and other agreements entered into between Japan and China, Taiwan, and South Korea, respectively, preserved their individual claims. *Id.* at 12a-13a. The

court noted that "the question whether the war-related claims of foreign nationals were extinguished when the government of their countries entered into peace treaties with Japan is one that concerns the United States only with respect to her foreign relations" and that the foreign relations power is "demonstrably committed by our Constitution not to the courts but to the political branches." *Id.* at 13a (citing *American Ins. Assn.* v. *Garamendi*, 539 U.S. 396, 423 n.12 (2003)).

In looking at the particular question of the management of relations with Japan for conduct during World War II, the court explained that "it has been the foreign policy of the United States to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting resolution of those claims through political means." Pet. App. 13a (quotation omitted). The Court of Appeals found that to interpret the treaties between Japan on the one hand, and China, Taiwan, or South Korea on the other hand would not only "undo" settled foreign policy of state-to-state negotiation with Japan but could also "disrupt Japan's 'delicate' relations with China and Korea." *Id.* at 14a-15a (quotation omitted). In so holding, the D.C. Circuit also accorded deference to "the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States." *Id.* at 6a.

In reaching its decision in this case, the D.C. Circuit took account of these and other foreign policy concerns as stated by the Executive. That well-reasoned decision faithfully applied the proper legal standards, conflicts with no other decisions, and is plainly correct.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW WAS A CORRECT APPLICATION OF SETTLED LEGAL STANDARDS AS TO WHICH THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision below faithfully applies this Court's precedents on the political question doctrine and deference to the Executive on foreign policy issues, and does not conflict with decisions from the other courts of appeals. What petitioners contend are conflicting decisions from the lower courts merely reflect each court's "analysis of the particular question posed" by each case. *Baker*, 369 U.S. at 211. The cited cases involved different factual and foreign policy contexts, different treaties or no treaties at all, and different positions by the Executive or no positions at all. In fact, all of the courts to have considered similar issues—claims relating to Japan's wartime conduct during World War II—have reached entirely consistent conclusions that such claims are not subject to adjudication in light of the Treaty of Peace and the foreign policy it embodies.

#### A. There Is No Conflict Regarding Application Of The Political Question Doctrine To Specific Facts.

In an attempt to create a conflict where none exists, petitioners mischaracterize the D.C. Circuit's opinion below, asserting that the D.C. Circuit held that "claims related to conduct during a war" are "constitutionally committed to the Executive Branch *as a categorical matter*." Pet. 8 (emphasis added). The D.C. Circuit made no such categorical holding. Instead, it considered "'the *particular question*' posed in this case * * * namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the [petitioners'] claims." Pet. App. 8a (quoting *Baker*, 369 U.S. at 211 (emphasis added). In reaching its conclusion that petitioners' claims are foreclosed by the

political question doctrine, the D.C. Circuit carefully considered the Treaty of Peace, the foreign policy it embodies, and the expressed views of the Executive regarding the foreign policy implications of this case.[5]

The opinion below is entirely consistent with cases considering application of the political question doctrine to claims involving other countries, growing out of other factual circumstances. The D.C. Circuit's decision in this case simply says nothing about the justiciability of claims for alleged misconduct in Germany or Italy during World War II, which are governed by different agreements and foreign policies, *see Ungaro-Benages* v. *Dresdner Bank, AG*, 379 F.3d 1227 (11th Cir. 2004); *Alperin* v. *Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), or about the justiciability of claims against the Palestine Liberation Organization for terrorist acts committed in Israel, *see Ungar* v. *Palestine Liberation Org.*, 402 F.3d 274 (1st Cir.), or about conduct during the war in Bosnia, *see Kadic* v. *Karadizic*, 70 F.3d 232 (2d Cir. 1995). The conflict petitioners assert simply reflects the consideration by the courts of differing circumstances.

In *Ungaro-Benages*, the Eleventh Circuit concluded that claims against two German banks seeking return of property allegedly illegally confiscated through the German state program of "Aryanization" during World War II, were not barred by the political question doctrine. 379 F.3d at 1230. That conclusion, based on a careful review of the "Foundation Agreement" entered into between the United States and Germany in 2000 to govern claims arising from

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[5] The District Court had expressly *declined* to reach the issue whether "war reparations are always justiciable," instead "conclud[ing] *based on the specific circumstances of this case* that plaintiffs' claims are nonjusticiable * * *." Pet. App. 62a n.9 (emphasis added). The D.C. Circuit left that ruling intact, likewise basing its conclusions on the specific circumstances of this case.

conduct in Germany during World War II, says nothing about petitioners' claims here against Japan. The Foundation Agreement requires only that the United States government file a Statement of Interest in any case seeking World War II reparations concerning conduct in Germany that states that "it is in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground but [that does] not suggest that the agreement itself provides an independent legal basis for dismissal." *Id.* at 1232. Considering just such a Statement of Interest, the Eleventh Circuit held that the plaintiffs' claims were not barred by the political question doctrine, because the United States had specifically agreed that such World War II reparations claims against Germany could proceed in United States courts and that the Foundation Agreement would not, by itself, provide a basis for dismissal of such claims. *Id.* at 1253-54.[6]

Likewise, the Ninth Circuit's decision in *Alperin* is completely consistent with the D.C. Circuit's decision below. *Alperin* involved claims against defendants for their alleged activities in support of the Ustasha regime that carried out atrocities in Croatia during World War II. 410 F.3d at 539-540. In *Alperin*, however, there was no treaty embodying a U.S. foreign policy that claims are to be resolved through government-to-government negotiations, and there was no statement of interest or amicus brief by the United States. *Id.*

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[6] The Eleventh Circuit went on to uphold the district court's dismissal of the complaint on the basis of international comity, finding that the strength of the interests of both the United States and Germany in using the forum established by the Foundation Agreement to resolve such claims, and the adequacy of that alternative forum, required the court to abstain from exercising jurisdiction. 379 F.3d at 1238-39. In reaching this conclusion, the Eleventh Circuit noted that "the executive's statement of national interest in issues affecting our foreign relations are entitled to deference." *Id.* at 1239 n.14 (citing *Altmann*, 541 U.S. at 701-702).

at 538, 549-550. Moreover, the court distinguished between two separate kinds of claims raised against the defendants there. Performing a claim-specific analysis, the Ninth Circuit concluded that the political question doctrine *barred* "War Objectives Claims" raising various war-related torts tied to the alleged assistance provided by the defendants to the Ustasha. *Id.* at 548. These alleged human rights violations were akin to the claims asserted by petitioners here. *Id.* at 543.

Petitioners argue that *Alperin* conflicts with the decision below by focusing on the "Property Claims" for return of property, which the Ninth Circuit found did not pose a non-justiciable political question. *Id.* at 548. But the Ninth Circuit distinguished the War Operations Claims from the Property Claims because the former involve the powers of the Executive branch to wage war and conduct foreign affairs, where there is only "a narrowly circumscribed role for the judiciary." *Id.* at 559 (internal quotation and citation omitted). The court held that deciding the War Operations Claims would require the judiciary to make a foreign policy determination about the wartime actions of a foreign government with which the United States was at war—something for which the judiciary has no manageable standards and that is committed to the political branches. *See id.* at 561 ("Condemning—for its wartime actions—a foreign government with which the United States was at war would require us to review[] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutional[ly] commit[ted].") (citations and quotations omitted). In contrast, the Ninth Circuit found that "the Property Claims consist of garden-variety legal and equitable claims for the recovery of property." *Id.* at 548. Even aside from the fact that the two cases involve very different circumstances, there is no conflict between the decision below and *Alperin* because *both* courts found that

similar kinds of claims—for human rights abuses during wartime—were barred by the political question doctrine.[7]

*Ungar* v. *Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005), and *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), are simply additional examples of courts making case-specific determinations concerning the claims before them. That the First and Second Circuits found that the political question doctrine did not bar adjudication of, respectively, claims against the PLO for terrorist actions in Israel, or against the self-proclaimed president of the unrecognized Bosnian-Serb entity for conduct during the war in Bosnia, poses no conflict with the decision below. Those cases did not involve the Treaty of Peace with Japan, nor did the Executive express the view that adjudication would interfere with foreign policy. To the contrary, in *Kadic* the Executive expressly "disclaimed" that the political question doctrine would bar the claims. 70 F.3d at 250. In neither of these cases did the court hold broadly that claims for conduct "related to highly politicized foreign wars" could never run afoul of the political question doctrine. Pet. 11. To the contrary, each court carefully considered the *Baker* v. *Carr* factors and determined that the particular claims before them did not

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[7] Part of the *Alperin* case is the subject of pending certiorari petitions. But those petitions do not challenge the Ninth Circuit's ruling as to the War Operations claims, only the ruling as to the Property Claims. Because the *Alperin* respondents did not file a cross-petition challenging the former ruling, any such challenge has been waived. *See* S. Ct. R. 12.5, 13.4. Accordingly, any ruling in *Alperin*, either affirming or reversing as to the Property Claims, would have no conceivable relevance to this case, which involves not only a unique treaty embodying a specific foreign policy as informed by the views of the Executive, but also claims akin to the War Operations Claims that are not subject to further review in *Alperin*.

pose nonjusticiable political questions. *See Ungar*, 402 F.3d at 279-280; *Kadic*, 70 F.3d at 249-250.

In fact, every state and federal courts that have actually examined war claims relating to the Treaty of Peace have reached the same conclusion as the D.C. Circuit: that adjudication of such claims is barred. The court in *Taiheiyo Cement Corp.* v. *Superior Court*, 12 Cal. Rptr. 3d 32, 35, 41-42 (Ct. App. 2004)—expressly relying on the D.C. Circuit's determination that the Treaty of Peace "embodies the federal government's foreign policy that claims against Japan and its nationals are to be resolved diplomatically"—held that the Treaty barred adjudication of World War II-related claims of a Korean national against a Japanese company.[8] Similarly, in *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 716 (9th Cir.), the Ninth Circuit held that state-law claims of Korean and Chinese nationals against Japanese companies were barred because the state statute creating the cause of action "implicate[d] the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions."[9] *See also Mitsubishi Materials*,

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[8] Although *Taiheiyo* involved the related doctrine of federal foreign affairs preemption, its conclusion is completely consistent with the D.C. Circuit's ruling that the settled foreign policy embodied in the Treaty likewise bars adjudication of alleged uncodified international law claims that seek similar war reparations. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 731 (2004) (Congress may "shut the door to the law of nations * * * at any time (explicitly, *or implicitly by treaties or statutes that occupy the field*) * * *.") (emphasis added).

[9] The court also noted that the legal question whether federal law preempts a *German* plaintiff's World War II-related claim was justiciable because not "every dispute" over the application of a treaty is non-justiciable. *Id.* at 713 n.11. In this case, the D.C. Circuit did not hold that "every dispute" that touches on a treaty raises a political question; it merely held that this particular case is nonjusticiable in light of the specific policy embodied in the Treaty of

6 Cal. Rptr. 3d at 178 (Treaty of Peace bars claims of American POWs against Japanese companies).

The D.C. Circuit's decision is not only consistent with other cases involving the Treaty, it is plainly correct. The Treaty embodies a clear foreign policy of the United States under which all Japanese reparations issues would be addressed through government-to-government negotiations, in order to ensure the peace and stability of the entire Asian-Pacific region. The D.C. Circuit properly declined to second-guess those policy determinations, which implicate not only the foreign policy of the United States but that of other sovereign nations. The prospect of a U.S. court being required to interpret bilateral agreements entered into between Japan and its Asian neighbors—which implicate, among other issues, sensitive foreign policy concerns involving Japan and the two different governments that have claimed to represent China over the years—amply demonstrates the non-justiciable political nature of the case.

In any event, given that this case turns on a specific foreign policy arising from a unique treaty—and that it has already been more than 50 years since the conclusion of the 1951 Treaty of Peace—the precise issue resolved by the D.C. Circuit is unlikely to recur with any frequency, if at all. Thus, whatever else can be said about the D.C. Circuit's well-reasoned decision, there is no need for this Court to expend its limited resources to resolve this unique policy dispute.

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Peace. The Ninth Circuit did not hold to the contrary. In fact, the court's holding that the Treaty preempted similar claims brought against companies under state law, *id.* at 714-715, is entirely consistent with D.C. Circuit's holding in this case. *See supra* n.8.

### B. There Is No Conflict Regarding The Deference Owed The Executive On Treaty Interpretation And Foreign Policy.

There is likewise no conflict between the decision below and decisions from other circuits concerning the deference due to the views of the Executive Branch. Once again, the outcomes in the cases petitioners cite are explained by the differing circumstances of the cases and the particular interest stated by the Executive in each case.

The very premise of petitioners' argument is flawed. The D.C. Circuit did not, as petitioners suggest, accord "complete deference" to the views of the Executive in this case without engaging in an independent analysis of justiciability. Pet. 12. After noting the "thorough and persuasive Statement of Interest" filed by the United States, Pet. App. 6a, the D.C. Circuit conducted its *own* analysis, concluding that "it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort actions." *Id.* at 9a. The Court of Appeals thus followed this Court's guidance in *Powell* v. *McCormack*, 395 U.S. 486 (1969), and made its own assessment as to the justiciability of the case. *Cf.* Pet. 13 n.4. The court also cited this Court's decision in *Altmann*, which noted "that a Statement of Interest concerning 'the implications of exercising jurisdiction over [a] particular [foreign government] in connection with [its] alleged conduct * * * might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.'" Pet. App. 7a-8a (quoting *Altmann*, 541 U.S. at 702).

Because the decision below is distinguishable from the decisions cited by petitioners, any purported conflict is illusory. The Statement of Interest at issue in *Ungaro-Benages* was based on the Foundation Agreement with Germany, not the Treaty of Peace with Japan, and

accordingly asserted a different interest than that asserted by the United States below. The statement, as required by the Foundation Agreement, merely informed the court "that it is in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground but [did] not suggest that the agreement itself provides an independent legal basis for dismissal." 379 F.3d at 1232. The views expressed by the Executive on appeal were similarly non-committal. *See* U.S. Amicus Br. filed in *Ungaro-Benages*, 2003 WL 23857369, at *15-16 ("[T]he United States does not take a position with respect to the merits of the parties' particular legal arguments"). And in *Kadic* v. *Karadzic*, the United States "expressly *disclaimed* any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits." 70 F.3d at 250 (emphasis added). Even in the absence of such a statement, the Second Circuit in *Kadic* noted that "an assertion of the political question doctrine by the Executive Branch" would be "entitled to respectful consideration." *Id.*

Likewise here, the D.C. Circuit properly applied a "policy of case-specific deference to the political branches." Pet. App. 7a (quoting *Sosa*, 542 U.S. at 733 n.21). The foreign policy concerns identified by the United States, moreover, were not rendered in a vacuum but rather were tethered directly to the Treaty of Peace. *See supra* at 7. Thus, the D.C. Circuit merely applied the well-settled and venerable principle that "'[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" Pet. App. 28a (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)).

In any event, for the reasons set forth above and in the opinions below, the D.C. Circuit's decision was plainly correct even without regard to the Executive's views. Thus, certiorari is unwarranted not only because there is no conflict

among the lower courts, but also because the outcome of the case would be no different under whatever degree of deference is accorded the Executive's view.

### C. There Is No Conflict Concerning Interpretation Of Foreign Treaties.

Petitioners also contend that the D.C. Circuit's decision not to accept petitioners' invitation to determine their rights under bilateral agreements between Japan and China, Taiwan, and South Korea, respectively, conflicts with decisions of this Court and of other of the courts of appeals regarding interpretation of foreign treaties. Pet. 14-17. Not so. None of the cases cited by petitioners involved an asserted conflict with U.S. foreign policy—much less a policy to leave specific matters for resolution by government-to-government negotiations—and none of them conflicts with the measured and case-specific determination by the D.C. Circuit below. Indeed, the lack of any conflict is not all surprising, since petitioners never once cited any of these decisions involving foreign treaties during the nearly five years this case was pending in the lower courts.

Once again, petitioners' argument is based on a mischaracterization of the decision below. The D.C. Circuit did not hold that it would *never* interpret a treaty between two foreign sovereigns. Instead, it held that interpreting these specific agreements would involve political questions in this particular case, where: (1) the policy established by the Treaty of Peace is that all claims against Japan for its conduct during World War II were to be addressed by government-to-government negotiations, not private lawsuits; and (2) the Executive had explained the foreign relations problems that would ensue should the court venture to resolve conflicting interpretations of the foreign agreements in this particular ca

Petitioners cite *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 53 (1829), which arose in a wholly different context. Yet to the

extent the case has any relevance at all, it actually supports the D.C. Circuit's decision in this case. *Foster* involved a boundary dispute that turned in part on an interpretation of a foreign treaty. Yet Congress, through legislation, had endorsed a particular interpretation of that treaty. *Id.* at 304. Thus, far from simply construing the treaty itself, the Court deferred to Congress's interpretation, noting that "[a] question like this respecting the boundaries of nations is * * * *more a political than a legal question*; and in its discussion, the courts of every country must respect the pronounced will of the legislature." *Id.* at 309 (emphasis supplied).

In *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 584 (1823), this Court mentioned the 1763 Treaty between Spain, Great Britain and France only in passing as it determined what effect to give ownership claims to land based on grants from Indians concerning lands over which European governments had claimed dominion. *See id.* at 571-572 ("The plaintiffs in this cause claim the land * * * under two grants, purported to be made * * * by the chiefs of certain Indian tribes * * * and the question is whether, this title can be recognized in the Courts of the United States."). Nothing in that decision says anything about the application of the political question doctrine to the circumstances of this case.[10]

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[10] *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986), is similarly off-point. That case merely held that not every dispute over interpretation of a *U.S.* treaty raises a political question because "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. The D.C. Circuit did not shirk from its responsibilities to interpret U.S. treaties. Far from it, the court correctly construed the Treaty of Peace as embodying a clear foreign policy "that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits." Pet. App. 9a-10a.

The court of appeals' decisions cited by petitioners likewise pose no conflict. In *Prewitt Enterprises, Inc.* v. *OPEC*, 353 F.3d 916, 923-924 (11th Cir. 2003), no treaty was involved. Instead, the Eleventh Circuit turned to Austrian law, which incorporated an agreement between OPEC (which is not a sovereign state) and Austria (where OPEC is headquartered) concerning service of process against OPEC. In *Sea Hunt, Inc.* v. *The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), the Fourth Circuit looked to a 1763 Treaty between Great Britain and Spain to determine whether a U.S. plaintiff could claim the wrecks of two Spanish warships, but both of those nations had agreed as to the interpretation of that treaty as applied to the question raised in the case. The court found that agreement between sovereigns to be "significant." *Id.* at 646. The D.C. Circuit below was faced with no such agreement by the sovereigns as to the interpretation of the foreign treaties involved here. Nor is *Ungar*, *supra*, to the contrary. The court in *Ungar* specifically noted that because there was no Statement of Interest filed by the United States, the court's decision—and interpretation of agreements between Israel and the Palestinian Authority "did not signify a lack of respect for, or conflict with, the wishes of the political branches." 402 F.3d at 281. This case presents precisely that kind of conflict.

Thus, petitioners' newly-cited cases have no bearing on this case. The foreign policy embodied in the Treaty of Peace was to leave the resolution of war claims against Japan to *government-to-government* negotiations, not private lawsuits. Whatever the content of Japan's bilateral treaties and agreements, the D.C. Circuit correctly refrained from accepting petitioners' invitation to arbitrate those sensitive foreign policy issues. It was and is the clear foreign policy of the United States to leave the resolution of such issues to the countries involved, not the U.S. judiciary.

## II. THE DECISION BELOW IS FAITHFUL TO THIS COURT'S PRECEDENTS CONCERNING THE SEPARATION OF POWERS.

Perhaps recognizing that there is no conflict between the D.C. Circuit's opinion below and decisions from other of the courts of appeals, petitioners argue that certiorari should be granted due to the "fundamental separation of powers issues" raised by this case. Pet. 18. Petitioners' argument on this point is yet again based on a broad overreading of the decision below. The D.C. Circuit's limited, case-specific decision below is completely consistent with this Court's precedents. In fact, the separation of powers doctrine would have been contravened by a contrary ruling, which would have entangled the courts in sensitive foreign policy issues that the political branches have directed be resolved through diplomatic means.[11]

As explained above, the D.C. Circuit addressed the specific question before it, and did not hold that all "claims related to conduct during a war are the exclusive province of the Executive Branch," or give "virtually blanket deference" to the views of the Executive. Pet. 18. The D.C. Circuit did not hold that it is *never* appropriate to interpret treaties—whether U.S. or foreign—in a case involving foreign policy. Rather, it held that *in this case*, given the particular treaty involved and the particular views of the Executive, the claims posed a

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[11] Petitioners complain, Pet. 18 n.6, that the D.C. Circuit decided justiciability before the question of subject matter jurisdiction. But as the D.C. Circuit explained, petitioners "point to no authority suggesting [that] a dismissal under the political question doctrine is an adjudication on the merits" and "[t]hat is not how the Supreme Court sees the matter." Pet. App. 4a. *See Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (law "does not dictate a sequencing of jurisdictional issues"); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (justiciability implicates Article III jurisdiction).

nonjusticiable political question. Nothing in the decision below suggests that the D.C. Circuit, if presented with different claims dealing with the conduct of a different sovereign, governed by different treaty provisions, could not reach a different result.

Rather than conflicting with the decision below, the cases petitioners cite support a case-by-case determination of the application of the political question doctrine, even to cases involving the interpretation of treaties. Each of those cases—which concern treaties entered into by the United States—note, in the same passages cited by petitioners, the role of the political branches when "political" issues arise in the interpretation of treaties.[12] Thus, the full sentence from *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961)—of which petitioners cite but a fragment (Pet. 21)—reads: "While courts interpret treaties for themselves, *the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight*." (emphasis added). That is precisely how the D.C. Circuit considered the particular question posed in this case; it interpreted the Treaty of Peace for itself, giving "great weight" to the views of the political branches.

It is petitioners who seek a blanket pronouncement that the political question doctrine does not apply to cases arising under the FSIA or the ATS. Pet. 19. Such an argument,

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[12] *See Jones* v. *Meehan*, 175 U.S. 1, 32 (1899) ("the construction of treaties is the peculiar province of the judiciary * * * *except in cases purely political*") (emphasis added); *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921) ("the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight") (citations omitted); *Wilson* v. *Wall*, 73 U.S. (6 Wall.) 83, 89 ("The construction of [treaties] is the peculiar province of the judiciary, *when a case shall arise between individuals*.") (emphasis added).

however, is completely refuted by this Court's decisions. In *Altmann*, this Court explained that its holding concerning the retroactive application of the FSIA did not negate the deference that was due to Statements of Interest filed by the Executive Branch concerning "particular question[s] of foreign policy." 541 U.S. at 702. And, as the D.C. Circuit noted below, in *Sosa*, *supra*, this Court explained that "[a] policy of 'case-specific deference to the political branches' may be appropriate in cases brought under the Alien Tort Statute." Pet. App. 7a (quoting *Sosa*, 542 U.S. at 733 n.21).[13]

Moreover, and in any event, petitioners' argument presupposes that this case was properly brought under the FSIA and the ATS. In fact, it was not. The District Court squarely held that Japan was entitled to FSIA immunity. *See* Pet. App. 47a-61a. And Japan has contended, in accord with this Court's clear precedents, that the ATS cannot apply to this case against a foreign sovereign. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (ATS does not apply in action against foreign state because "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"); *Sosa*, 542 U.S. at 724 (ATS "is a jurisdictional statute creating no new causes of action"); *see also* Pet. App. 33a-34a (D.C. Circuit holding that ATS does not apply to this case). Thus, although the D.C. Circuit did not reach these issues on remand, this Court would have to do so in order to opine on petitioners' incorrect assertion that the FSIA and ATS some-

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[13] The cases cited by petitioners (*see* Pet. 20) do not hold that the political question doctrine cannot apply in cases brought under the FSIA or the ATS. As noted above, in *Ungar*, *Kadic*, *Alperin* and *Ungaro-Benages*, each court examined the particular case before it in reaching a conclusion as to whether the claims asserted were nonjusticiable political questions. In none of these cases did the court hold, as petitioners argue, that the political question doctrine cannot apply to cases brought under these statutes.

how trump the political question doctrine. Given the overwhelming likelihood that the Court would find that neither statute supports petitioners' case, this case does not present a proper vehicle for examining any hypothetical interplay between those statutes and the political question doctrine.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CRAIG A. HOOVER*
JONATHAN S. FRANKLIN
AUDREY J. ANDERSON
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5694

*Counsel of Record

*Counsel for Respondent*

No. 05-543

IN THE

# Supreme Court of the United States

HWANG GEUM JOO, YUAN ZHULIN, LOLA TOMASA SALINOG, LIU HUANG A-TAU, KIM BOON-SUN, KIM SANG HEE, KIM SOON-DUK, YI YONG NYO, KIM BOK-DONG, LU XIUZHEN, GUO YAYING, ZHU QIAOMEI, PRESCILA BARTONICO, NARCISA CLAVERIA, MAXIMA REGALA DE LA CRUZ, on behalf of themselves and all others similarly situated,

*Petitioners*,

*v.*

GOVERNMENT OF JAPAN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF

MICHAEL D. HAUSFELD
*Counsel of Record*
RICHARD A. KOFFMAN
AGNIESZKA M. FRYSZMAN
MARKA A. PETERSON
COHEN MILSTEIN HAUSFELD
& TOLL, P.L.L.C.
1100 New York Avenue, N.W.
Suite 500
Washington, DC 20005
(202) 408-4600

*Attorneys for Petitioners*

*(Additional Counsel Listed on Inside Cover)*

BARRY A. FISHER
DAVID GROSZ
FLEISHMAN & FISHER
1888 Century Park East
Suite 1750
Los Angeles, CA 90067

BILL LANN LEE
MORRIS A. RATNER
SCOTT NEALEY
LIEFF CABRASER HEIMANN
& BERNSTEIN
275 Battery Street
30th Floor
San Francisco, CA 94111-3339

DUNCAN B. HOLLIS
*Assistant Professor of Law*
TEMPLE UNIVERSITY SCHOOL OF LAW
1719 N. Broad Street
Philadelphia, PA 19122

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## INTRODUCTION

Japan dispels neither the existence of conflicts among the Courts of Appeals nor the importance of the issues those conflicts represent. Japan has merely pointed to highly specific factual differences that both ignore and misconstrue the relevant factual and legal differences between the cases. Under Japan's analysis, no circuit split could exist except between cases with identical fact patterns. Indeed, by claiming the differences in outcomes among the circuits merely reflect the "particularized approach" required under the political question doctrine, Japan would make any review of the legal principles involved impossible. The relevant bases for decision-making show, however, that a split exists among the circuits on the application of the political question doctrine to cases involving war-related claims.

## ARGUMENT

### I. A Circuit Split Exists on the Proper Standards for Applying the Political Question Doctrine to Claims for War-Related Conduct.

#### A. Japan's Attempt to Explain Conflicting Circuit Court Cases As Mere Factual Differences Fails.

The legal question raised by these cases is whether claims related to war-time conduct are non-justiciable. The D.C. Circuit concluded that "our Constitution does not vest authority to resolve [the] dispute in the courts" whether the series of treaties entered into by Japan after World War II "preserved" or "extinguished" Petitioners' claims against Japan. App. 6a. The court made the sweeping legal observation that war-time claims are the province of the Executive Branch, and that therefore such claims are barred under the political question doctrine even if they are not expressly extinguished by post-war treaties. App. 11a-12a (citing *Ware v. Hylton*, 3 U.S. 199, 230 (1796)). Thus

whether the 1951 Treaty between Japan and the U.S. and other Allied Powers ("San Francisco Treaty") and agreements by Japan with other Asian countries ***actually*** extinguished Petitioners' claims did not matter to the court. Indeed, the court pointedly refused to determine whether Petitioners' claims were settled or extinguished by the applicable treaties – declining to interpret the treaties to which Petitioners' home countries were actually parties – and instead deferred to Executive power as a categorical matter. App. 14a-15a.

The differences between the categorical approach taken by the D.C. Circuit and other Circuits' approaches to similar cases are not merely factual as Japan contends, but concern the central question of whether such claims are generally justiciable at all. First, Japan's argument that there is no circuit split because other circuits were not interpreting the San Francisco Treaty is frivolous, because any case could be distinguished as "not conflicting" if examined at this level of specificity. Opposition to Petition for Certiorari ("Opp. Cert.") at 10. Here the content of the post-war treaty at issue is even less relevant to whether there is a conflict, in light of the D.C. Circuit's focus on the bare existence of the San Francisco treaty, rather than the terms of the treaties. Indeed, Japan does not explain how the treaties at issue in the other cases differ from the San Francisco Treaty in ways that produce different outcomes. In fact, the other treaties confirm a conflict with the D.C. Circuit. For example, in *Ungaro-Benages v. Dresdner Bank AG*, the U.S. agreement with Germany at issue, the Foundation Agreement, specifically redressed plaintiff's claims. 379 F.3d 1227, 1233, 1234 (11th Cir. 2004). The Foundation Agreement thus presented a ***stronger*** basis for holding that executive action had displaced the courts compared to the San Francisco Treaty, which does not redress Petitioners' claims and to which most Petitioners' home countries are not even parties.

In fact, in a case decided on November 23, 2005, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), the Second Circuit held that claims against Austria for Nazi-era property deprivations were nonjusticiable in light of the Foundation Agreement, the precise argument rejected in *Ungaro-Benages*. *Id.* at 71. The court noted that its decision conflicted with the Eleventh Circuit case. *Id.* at 71 n.16. *Whiteman* thus adds to the circuit split on the political question issues presented here.

Japan's other attempts to distinguish *Ungaro-Benages* on its facts also fail. Japan claims *Ungaro-Benages* is distinguishable because the Executive Branch did not take the position there that the treaty at issue required dismissal of the case. Opp. Cert. at 12. However, this disregards the more pertinent fact that the Executive in that case submitted a Statement of Interest opposing adjudication and urging dismissal, 379 F.3d at 1231-32, just as the Executive Branch did here, yet the Eleventh Circuit nevertheless declined to defer to the Statement of Interest on political question grounds. *Id.* at 1236. The fact that the Eleventh Circuit declined to apply the political question doctrine in spite of the Foundation Agreement's redressing the plaintiff's claims, and the Executive Statement of Interest urging dismissal, puts *Ungaro-Benages* in square conflict with the D.C. Circuit's decision.

Japan also attempts to explain the differences in the results of the cases according to whether the Executive Branch filed a Statement of Interest opposing adjudication. *E.g.*, Opp. Cert. at 12. But that attempt simply does not explain differences among the circuits on whether war-related claims are categorically committed to the Executive Branch. Indeed in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), *petition for cert. filed sub nom. Order of Friars Minor v. Alperin*, 74 U.S.L.W. 3146 (U.S. Sept. 7, 2005) (No. 05-326), the Ninth Circuit rejected the same two

factors – (1) a U.S. policy favoring government-to-government resolution of war-related claim; and (2) foreign relations problems flowing from U.S. courts' adjudicating such claims. *Id.* at 568. The court also expressly rejected the type of categorical reasoning employed by the D.C. Circuit. *See id.* at 547 ("The dissent would have the political question doctrine remove from our courts 'All matters that fall by their constitutional DNA into this sphere [of conduct involving foreign relations]. This over-inclusive approach threatens to sweep all cases touching foreign relations beyond the purview of the courts" (citation omitted)).[1] The court did

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[1] Japan also claims *Alperin* is consistent with the D.C. Circuit's decision because the human rights claims dismissed in *Alperin* were similar to Petitioners' claims. Opp. Cert. at 13. However, the Ninth Circuit indicated its holding "does not signify that slave labor claims automatically raise issues that are committed to the political branches." 410 F.3d at 562 n.20. Further, it dismissed the human rights claims based on reasoning that does not apply here: The claims dismissed in *Alperin* concerned alleged war crimes by the Vatican, which had never been judged by the United States for wartime conduct. *Id.* at 560 (noting Allies chose not to prosecute the Vatican in the Nuremberg Trials). Further, the court noted that the plaintiffs had alleged only indirect involvement and indirect benefit by the Vatican. *Id.* at 560-61. Petitioners do not ask the courts to enter such uncertain territory here: Both Japan's war time conduct and the issue of sex trafficking in women and girls have been condemned by the United States. Trafficking Victims Protection Act, 22 U.S.C.A. § 7101 (2000). Further, as with the property claims held justiciable in *Alperin*, judicially discoverable and manageable standards exist to adjudicate these recognized wrongs. *See Alperin*, 410 F.3d at 553. *See also id.* at 555 (noting the manageability inquiry focuses on "whether the courts are capable of granting relief in a reasoned fashion"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1996) ("universally recognized norms of international law provide judicially discoverable and manageable standards" for claims for rape, torture, and other torts committed during the Balkan conflict). In any case, the D.C. Circuit did not hold that it lacked standards for adjudicating Petitioners' claims, but rather that, as an overarching matter, the claims were committed to the Executive Branch because of their foreign policy implications.

suggest that it might have decided differently if a treaty covered the *Alperin* plaintiffs' claims, *id.* at 549-50, but the Eleventh Circuit's contrary decision that the Foundation Agreement did ***not*** bar adjudication under the political question doctrine indicates, in fact, that the Ninth and Eleventh Circuits ***differ*** on when a post-war treaty renders claims non-justiciable, a question also presented by this case. *See also id.* at 546-47 (noting wide range of outcomes in courts that have considered the justiciability of World War II-era claims); *Whiteman*, 431 F.3d at 71 n.16 (noting its disagreement with Eleventh Circuit).

Japan's attempt to explain the outcome of the cases as a function of the position of the Executive Branch also fails because Japan misconstrues the cases. Contrary to Japan's contention, the Eleventh Circuit and Second Circuit did ***not*** hold that strong deference to the views of the Executive Branch was appropriate with respect to the justiciability of the war-related claims in those cases. Opp. Cert. at 12-13. The Eleventh Circuit in *Ungaro-Benages* expressly declined to defer to the Executive Statement of Interest urging dismissal of the case in light of the Foundation Agreement. 379 F.3d at 1236 & n.12. Similarly in *Kadic*, the Second Circuit expressly stated that it would ***not*** necessarily have deferred to the Executive Branch even if the Executive Branch had opposed adjudication on political question grounds. 70 F.3d at 250. Thus, the fact that the Executive Branch did not submit a Statement of Interest in *Kadic* hardly renders the case consistent with the D.C. Circuit's reasoning. Moreover, Japan's contention that the Executive Branch's views control and explain the outcome of these cases undercuts its contention that courts have not automatically deferred to the Executive Branch on issues of nonjusticiability in the field of foreign affairs. Indeed, if deference to the Executive Branch explains the outcome of the other circuit court cases, then the D.C. Circuit opinion – which Japan contends does not reflect complete deference to

the Executive Branch – would itself have created a circuit split on this issue.

Because the cases cannot be viewed as myopically as Japan urges, the issues decided by the D.C. Circuit ***are*** likely to recur. Indeed, both the Eleventh Circuit and the Ninth Circuit have recognized the conflicting results reached by different courts that have considered the application of the political question doctrine to the large number of World War II-era cases currently in the federal courts. *See Ungaro-Benages*, 379 F.3d at 1236 & n.12; *Alperin*, 410 F.3d at 546-47.[2]

### B. Japan Fails to Distinguish *Japan Whaling* and Cases in Which Circuit Courts Have Construed Foreign Treaties.

Japan also attempts a tortured distinction among the circuit court cases involving the interpretation of foreign treaties. This attempt similarly fails to explain away the conflict created by the D.C. Circuit's refusal to interpret the foreign treaties.

Japan claims *Prewitt Enterprises, Inc. v. O.P.E.C.*, 353 F.3d 916 (11th Cir. 2003), is irrelevant to a circuit split because it involved the interpretation of Austrian law. Opp. Cert. at 21. However, the Austrian law interpreted in *Prewitt*

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[2] Japan also claims support from state court cases determining that a California statute, Cal. Civ. Proc. Code § 354.6 (1999), which created a private cause of action for claims of World War II slave labor, exceeded that state's foreign affairs power. Opp. Cert. at 15-16. The question whether a state statute that provided a cause of action for violations of international law exceeded states' foreign relations powers – a question of federal-state relations – is not relevant to the instant case, which concerns whether claims asserted under federal statutes are nonjusticiable under federal separation of powers principles. *See Baker v. Carr*, 369 U.S. 186, 210 (1962).

directly incorporated the headquarters agreement between OPEC member states and Austria. *Prewitt*, 353 F.3d at 919. Thus the Eleventh Circuit interpreted a foreign agreement involving several foreign states, and Japan fails to explain how this is consistent with the D.C. Circuit's refusal to interpret the foreign agreements at issue here.

Japan also claims that the court's interpretation of foreign agreements in *Ungar v. P.L.O.*, 402 F.3d 274 (1st Cir. 2005), is consistent with the D.C. Circuit's application of the political question doctrine because the Executive Branch did not submit a statement of interest opposing interpretation in that case. Opp. Cert. at 21. Again, Japan attempts to reduce the political question doctrine to a function of the Executive's views. If, however, the political question doctrine depends on more than the Executive's views (and even Japan protests that the D.C. Circuit's deference to the Executive Branch was not absolute), then the Circuit Courts' willingness to interpret foreign agreements under the doctrine is a separate question from whether the Executive Branch actively opposed adjudication. Under this view, the First Circuit's determination in *Ungar* that the political question doctrine did ***not*** apply is indeed in conflict with the D.C. Circuit, because the First Circuit so held in spite of the necessity of interpreting agreements far more controversial and likely to interfere with an active foreign conflict and ongoing diplomatic efforts by the United States, than the World War II agreements – and the absence of diplomatic action – present here. *See id.* at 280 (rejecting defendants' argument "presum[ing] that the district court intruded into forbidden territory when it interpreted an array of United Nations resolutions and Israeli-PLO agreements in a politically controversial manner").

Similarly, Japan's contention that the interpretation of the foreign treaty in *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000),

is consistent with the D.C. Circuit's refusal to interpret the treaties here, merely because in *Sea Hunt* the parties to the treaty agreed on the treaty's interpretation, makes little sense. Opp. Cert. at 21. It can hardly be the case that courts may interpret treaties only when their meaning is already settled.

In addition, Japan cannot explain how the D.C. Circuit's approach is consistent with *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986). *Japan Whaling* instructed courts to interpret treaties and statutes even if the results conflict with Executive Branch policy and actions. *Id.* *Japan Whaling's* holding is thus relevant in that it holds a federal court must still interpret and apply the law even when doing so may conflict with executive action or agreements in the foreign policy arena. *Id.* at 230. The D.C. Circuit's decision cannot be reconciled with this principle.

## II. Contrary to Japan's Contention, Addressing the Political Question Issue Prior to Subject Matter Jurisdiction Was Not Appropriate, and Subject Matter Jurisdiction Exists Over Petitioners' Claims.

Although the issue is not raised in the Petition, Japan contends that it was appropriate for the Circuit Court to consider whether the political question doctrine barred Petitioners' claims before addressing whether the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA). Opp. Cert. at 22 n.11. Petitioners believe the court below erred in failing to consider subject matter jurisdiction under the FSIA before considering the political question issue. *See Powell v. McCormack*, 395 U.S. 486, 512 (1969) (there is a difference "between determining whether a federal court has 'jurisdiction of the subject matter' and whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"); *Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d

Cir. 1980). *But see Whiteman*, 431 F.3d at 70 (addressing justiciability before addressing immunity under the FSIA) (citing *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005)).

Japan also hints repeatedly that this Court should deny certiorari because Japan is immune from suit under the FSIA. Opp. Cert. at 5, 24. Petitioners believe that if the Circuit Court had addressed the issue of whether Japan's operation of for-pay brothels falls under the commercial activities exception to the FSIA, it would have held Japan is not immune from suit. Nevertheless, the Court should disregard Japan's attempt to complicate the political question issues in this case with its foreign sovereign immunities argument, because the issue is not currently before the Court. If the Court decides that the Circuit Court should have considered subject matter jurisdiction before considering the political question issue, the proper course is to remand the case to the Circuit Court to consider the immunity issue.

Finally, Japan mischaracterizes Petitioners' separation of powers claim as suggesting that the political question doctrine is inapplicable to cases involving the FSIA or the ATCA. Opp. Cert. at 23. In fact, Petitioners argue separation of powers is implicated, not by the political question doctrine itself, but by the D.C. Circuit's decision to treat the Executive's views as dispositive. Thus, the case raises the question whether the foreign affairs power of the Executive may supersede – through blanket judicial deference – statutory schemes set forth by Congress. The Court should grant the Petition to resolve the circuit split on these important questions.

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Respectfully Submitted:

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Michael D. Hausfeld
Richard A. Koffman
Agnieszka M. Fryszman
Marka Peterson
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.
1100 New York Avenue, N.W.
West Tower - Suite 500
Washington, D.C. 20005-3964
(202) 408-4600

Barry A. Fisher
David Grosz
Fleishman & Fisher
1875 Century Park East, Suite 2130
Los Angeles, CA 90067
(310) 557-1077

Bill Lann Lee
Morris A. Ratner
Scott P. Nealey
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, Suite 3000
San Francisco, CA 94111
(415) 956-1000

Duncan B. Hollis
Assistant Professor of Law
Temple University School of Law
1719 N. Broad St.
Philadelphia, PA 19122
(215) 204-2731